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LEADING ARTICLES

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NON-JOINDER AND MIS-JOINDER OF PARTIES PLAINTIFF IN MISSISSIPPI PLEADING--SOME CONFUSION IN THE CIRCUIT COURT PRACTICE AND PROCEDURE AS TO REMEDY

T. C. KIMBROUGH*

The subject of the joinder of parties, a part of the common law scheme of pleading, together with the common law and statutory remedies, is of peculiar interest to the legal profession at this time because of a growing tendency to develop procedural rules that make for greater dispatch and expedition in litigation.

At common law the rules of party-joinder depended almost entirely on the substantive rights of the litigants, as the right was disclosed by the face of the contracts or covenants entered into by the parties, or as their rights were determined by the construction placed upon the contracts by the courts.

It was a universal rule of the common law that when the legal interest of the parties was joint and the action *ex contractu,* the parties, if living, must all be joined. Thus, in a contract action, whenever the interest of the promisees was interpreted as joint by the court, the promisees had to sue together in any action brought on the contract. Partners, as an illustration, were required to join in suing on obligations owing to the partnership. This is so because: (a) one person ought not to sue alone for the whole whereof he is entitled to only, we will say, a moiety, and (b) one who is liable ought not to be subjected to more than one suit for one and the same entire cause of action. Further, the common law regarded a join contract as an entity, or single thing, and this made it impossible for one of the joint parties to bring an action alone. A declaration

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which professed to state a cause of action *ex contractu* with one of the joint parties left off was a nullity. It stated no cause of action.[1]

By common law, where a primary right was violated by a joint act or default of two or more, if the remedy was by action *ex contractu,* the wrongdoers should all be joined as defendants; if the action be in form *ex delicto,* all of the wrongdoers may or may not be joined as defendants at the option of the plaintiff.[2]

The reason for the distinction is that in contracts, if the obligation is joint, the liability can not be otherwise than joint, for a contract with two or more jointly is not a contract with each or with any of them severally; but where the wrongdoers join in a tortious act, in law the act of each is the act of all,[3] and the acts of all are the acts of each. Parties plaintiff have not such choice as to joinder or severance, because a right, unlike a liability, cannot be joint and several.

If there is a death of one or more of the obligees, the action must be brought by the survivor or survivors; if all of the obligees die, then the personal representative of the last survivor must bring the action. If one of the joint obligors die, the liability passes to the survivor or survivors, and on the death of all it passes to the representatives of the last survivor.[4]

It will therefore be observed that when the plaintiffs were joint owners of property which was damaged, they had to bring their action for damages jointly.[5]

The typical tort cases within the rule were suits by joint tenants, joint owners, and parceners, and certain suits by tenants in common. It is thus seen plaintiffs were compelled to join, or could join, only in a limited class of cases where their rights were joint.

A writer of repute says: "The rules of the common law as to the joinder of parties in actions at law may be said to be based upon a strict adherence to the nature of the rights to be enforced; the relation of the parties to such rights and the mode of trial; and instead of being exclusively technical, illogical and not based upon the facts, as is sometimes asserted, were the natural result of the

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[1] GOULD, PLEADING (5th Ed. 1892) IV, § 56; 6 WAITS, ACTIONS AND DEFENSE 110; Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154 (1863); ANDREWS, STEPHEN'S PLEADING (2nd Ed. 1901) §§ 30-36.

[2] ANDREWS, STEPHEN'S PLEADING (2nd Ed. 1901) §§ 25-26.

[3] *Ibid.*

[4] 1 CHITTY, PLEADING (11th Ed.) 19, 67; SHIPMAN, COMMON LAW PLEADING 393-4.

[5] 1 CHITTY, PLEADING (11th Ed.) 50.

facts constituting the cause of action and the relation of the parties thereto, and their various interests therein, and the adaptability of the issue to be joined between them to a trial by jury.[6]

The purpose of the writer in the foregoing discussion of the common law theory of the joinder of parties is to bring before the reader a background of the fundamental underlying reasons for the common law rules governing the joinder of parties.

An understanding of these fundamentals should throw light on, and be of assistance in making a study of the problem before us in Mississippi where the joinder of parties for three quarters of a century has been a blend of statute and common law. The history of the procedure in this state naturally and easily falls into three periods. The first period begins in 1817, the date of the organization of a state government, and ends with the legislation affecting the question found in the code of 1857.

The second period extends from the adoption of the Code of 1857 to the year 1880 when what is commonly known as "Campbell's Code," or the code of 1880 was promulgated. The third period began upon the adoption of the Code of 1880 and extends to the present time. Each of these periods present distinct and pronounced differences in the rules as to the remedy in cases of the non-joinder or mis-joinder of parties plaintiff or defendant.

The discussion which will follow has to do only with actions *ex contractu,* based on joint undertakings and liabilities, and actions *ex delicto* based on contract, such as a breach of a contract. Pure tort actions, as such, will not be considered. The reader's attention is called, in considering the subject, to section 2028 of the Code of 1930 concerning actions founded on joint or joint and several instruments[7] and the case of *White's Garage v. Boyd,*[8] in which this section was construed by our supreme court.

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[6]Andrews, Stephen's Pleading (2nd Ed. 1901) 71.

[7]Miss. Code Ann. 1930, § 2028: "In any action founded on a joint or joint and several bond, covenant, bill of exchange, promissory note, or other contract or liability of copartners, it shall be lawful to sue any one or more of the parties."

[8]White's Garage v. Boyd, 149 Miss. 383, 115 So. 334 (1928). The court in this case said: "We think the purpose of this statute (2028 Code 1930) was to abolish the common law rule that all persons jointly liable on a contract, express or implied, had to be sued jointly for a breach of such contract . . . . and certainly implied contracts are within the language of the statute."

THE FIRST PERIOD

The common law rules controlling the joinder of parties, together with the procedural rules affecting remedy in cases of improper joinder, during this period, were the same rules as existed at the time of the Revolution with but minor differences. The constitutions of 1817 and 1832, and all legislative acts touching the same, adopted and adhered to "judicial proceedings according to the course of the common law."[9] The quoted clause refers to the procedural common law as it was brought to this country by the colonists, unchanged except where conditions in a new country made it necessary.

The earliest reported case in this state having to do with the non-joinder or mis-joinder of parties is *Lillard v. The Planters Bank*.[10]

The court in that case, among other things, held, it was a well established rule of common law pleading that if the non-joinder or mis-joinder appeared upon the face of the pleading it should be taken advantage of by demurrer, and when the objection does not appear on the face of the pleadings, advantage must be taken of it by a plea in abatement. The court cites as authority for this announcement of the proper procedure, 1 Chitty, *Pleading* 53. Other remedies mentioned are: motion by defendant for non-suit if the vice appears after the trial has commenced; a waiver of the defect by the defendant and an instruction asked of the court to prorate the amount of the verdict according to the interest of the plaintiff; if the record showed the objection, then a motion in arrest of judgment; and if judgment was given for the plaintiff, the objection may be assigned as error. Several other cases decided during this period are to the same effect.[11]

THE SECOND PERIOD

This period was characterized by material statutory changes made in the common law procedure as to the remedies above mentioned. Articles 43 and 44, Section VI of the Code of 1857 provide that the defendant in order to take advantage of a non-joinder or mis-joinder of a party plaintiff or defendant must file written notice of the defect, together with the names of the parties causing it,

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[9] See: Miss. Const., 1817 and Miss. Const., 1832.

[10] 3 How. (Miss. 1838) 78; See also: The Agricultural Bank v. Harris, 2 S. & M. (Miss. 1844) 463; Rogers v. Hunter, 8 S. & M. (Miss. 1847) 642.

[11] 1 Chitty, Pleading 53. See note 8.

along with his *plea* or *demurrer*.[12] Under these sections a mere plea or demurrer standing alone, according to common law procedure, would avail the defendant nothing.

The giving of the written notice is mandatory and becomes a condition precedent to the taking advantage of the objection and securing a remedy at the hands of the court.[13]

An analytical study of the foregoing sections in the Code of 1857 reveals several fundamental changes made in the common law remedies: (a) The most outstanding to be mentioned is the requirement that the defendant must, as a condition precedent, before the trial, give written notice to the plaintiff of the vice in his pleading together with the names of the omitted or improperly joined parties. (b) If the required statutory notice was given, then the plaintiff had the legal right to ask and obtain from the court permission to amend his declaration without the dismissal of the action. (c) The court possessed the power to allow the amendment; and (d) with the all important result that the case would go to trial at once on the merits.

Any other procedure was a nullity and could be stricken from the files on proper motion being made. The defendant did not enjoy the privilege of electing between the usual common law procedure and the statutory procedure.

The statute was paramount. It reads, "the non-joinder or mis-joinder of a plaintiff, (or defendant as the case might be), *shall not be objected to by the defendant* at the trial unless he give written notice, etc." (Italics are the writer's.)

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[12]Miss. Code 1857, Section VI, Articles 43 and 44, reads as follows:

"Art. 43. The non-joinder or mis-joinder of a plaintiff shall not be objected to by the defendant at the trial, unless he give written notice thereof with his plea, or demurrer, stating the name of the person alleged to have been omitted, or improperly joined; and the court or judge before the trial of the issue, whether of law or fact, may allow the declaration and writ to be amended. by joining the party so omitted, or striking out the party so improperly joined; PROVIDED, The party so to be joined, or struck out, shall consent thereto, and the court or judge may impose such terms as may be thought proper.

"Art. 44. The non-joinder or mis-joinder of a defendant in any action upon contract, shall not be objected to on the trial of the cause, without like notice being given of the intended objection; and upon such notice being given, the court, or judge, at any time before the trial of the cause, may order, on such terms as may be thought proper, that the name of one or more of the defendants, be added, or struck out, if it shall appear that injustice will not be done by such amendment."

[13]*Ibid.*

Articles 43 and 44, Section VI were carried forward without change into the Code of 1871, becoming sections 671 and 672 of that code.[14]

The underlying notion and purpose of the legislature in making these changes in the common law rules is not difficult to understand. Under the common law procedure, when the defendant interposed his plea or demurrer, if the court ruled in his favor, the plaintiff's case was dismissed.[15] The order dismissing the case was inexorable, regardless of the hardship it imposed on the plaintiff. Under the common law procedural rules, a request to be allowed to amend his declaration would have fallen on deaf ears and necessarily would have been refused by the court.

The plaintiff's only recourse in the event of the plea or demurrer being held good was to refile his case and then begin all over again. If in the meantime the statute of limitations had run against his clients' cause of action, or his witnesses had died or gotten out of the way, there was no help for it. The cause of action could never be brought to trial.

The sections mentioned were meant to cure this intolerable condition.

This procedure prevented an abrupt dismissal of the case on a mere technicality in the pleading, and gave the opportunity by amendment to proceed in a natural and orderly manner to the trial of the case on its merits. The paramount purpose and end of all pleading should be to accomplish this object, namely, the production

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[14]MISS. CODE 1871, §§ 671 and 672. They read as follows:

"671. The non-joinder or mis-joinder of a plaintiff shall not be objected to by the defendant at the trial, unless he give written notice thereof with his plea or demurrer, stating the name of the person alleged to have been omitted or improperly joined; and the court or the judge, at any time before the trial of the issue, whether of law or fact, may allow the declaration and writ to be amended, by joining the party so omitted, or striking out the party so improperly joined; PROVIDED, the party so to be joined or struck out, shall consent thereto, and the court or judge may impose such terms as may be thought proper.

"672. The non-joinder or mis-joinder of a defendant, in any action upon contract, shall not be objected to on the trial of the cause, without like notice being given of the intended objection; and upon such notice being given, the court or judge, at any time before the trial of the cause, may order, on such terms as may be thought proper, that the name of one or more of the defendants be added, or struck out, if it shall appear that injustice will not be done by such amendment."

[15]Hennies v. Vogel, 66 Ill. 401 (1872); AMES, CAS. PLEADING 133. Note: SHIPMAN, COMMON LAW PLEADING (1923) 393-4; ANDREWS, STEPHEN'S PLEADING (2nd Ed. 1901) § 33; Hicks v. Branton, 21 Ark. 189 (1852); Pitkin v. Roley, 43 N. H. 139 (1856).

of an issue and then the bringing of the case to trial on its merits.[16] The statutes contemplate, under the statutory plan, that the amendments must be made, "before the trial is commenced." It is too late after the trial has begun to resort to this method.

The beneficial effect of the statute unfortunately stopped short at this point.

If it so happened the non-joinder or mis-joinder was not discovered by the defendant until the trial had actually gotten under way, the defendant's recourse, in order to take advantage of the objection, was to move for a nonsuit against the plaintiff, or he might waive the objection and ask for an instruction to the jury that recovery be limited to the proportionate right or interest of the plaintiff.[17] The defendant might also, after verdict, move in arrest of judgment, if the defect appeared upon the face of the records. This latter remedy, however, does not appear to have been resorted to in our courts.

While the statutes accomplished great good in simplifying the common law procedure in the respect mentioned, it did not go far enough. As already pointed out, if the defendant was driven to file a motion for non-suit by reason of what was developed by the evidence after the trial had commenced, and his motion was sustained, the order of the court would necessarily dismiss the plaintiff's case.[18] The court was without authority, in such a case, to allow an amendment of the declaration, although the defendant had informed the court in his motion for non-suit of the names of the parties omitted or improperly joined.[19] But it might be argued that such amendment, in some cases, would result in creating a new cause of action, which is never permissible by way of amendment. This is probably true, but in the majority of cases, it is submitted, the amendment would not result in the statement of a new cause of action, especially where an additional defendant was brought in, or a defendant was left off; and also in cases of mis-joinder of plaintiffs. The common law rule is harsh and too sweeping and should be properly limited by a statute which would be made to accomplish much good, just as sections 671 and 672 did. If the amendment in

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[16]Andrews, Stephen's Pleading (1901) 132; Phillips, Code Pleading (2nd Ed. 1932) § 125.

[17]McInnis Lumber Co. v. Rather, 111 Miss. 55, 71 So. 264 (1916); Halsey v. Norton, 45 Miss. 705 (1871); 15 Enc. Pleading and Practice 568; Puterbaugh, Pleading and Practice, Common Law (8th Ed.) 51.

[18]*Ibid.* Also: 1 Chitty, Pleading 452, 453.

[19]Clark and Brownell, *Joinder of Parties* (1927), 37 Yale Law Journal 28-62.

such cases should give rise to the question of a continuance, this could well be left to the sound discretion of the court to deny or grant on such terms as it deemed wise.

The much to be desired effect of proceeding to trial on the merits, without the plaintiff, in many cases, being thrown out of court would have resulted if the statutes had been so broadened as to cover the point now under discussion. The second period ended without further changes in the common law procedure in the subject matter being discussed.

THE THIRD PERIOD

This period covers the time from the adoption of the Code of 1880 to the present time. The code of 1880, so far as the wording of the statutes under consideration are concerned, made but little change in them.[20]

The actual change consisted in the omitting of the words, *"or demurrer,"* following the word, *"plea."* The statutes with this omission read, "The non-joinder or mis-joinder of a plaintiff (or of a defendant) shall not be objected to by the defendant at the trial, unless he gave written notice thereof with his plea, etc."

These two sections of the Code of 1880, 1511 and 1512, are brought forward practically unchanged into all subsequent codes down to and including the Code of 1930,[21] with the exception of the

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[20]MISS. CODE 1880, §§ 1511, 1512. They read as follows:

"1511. The non-joinder or mis-joinder of a plaintiff, shall not be objected to by the defendant at the trial, unless he give written notice thereof with his plea, stating the name of the person alleged to have been omitted, or improperly joined; and the court or judge at any time before the trial of the issue, whether of law or fact, may allow the declaration and writ to be amended, by joining the party so omitted, or striking out the party so improperly joined; PROVIDED, the party so to be joined, or struck out, shall consent thereto, and the court or judge may impose such terms as may be thought proper.

"1512. The non-joinder or mis-joinder of a defendant in any action upon contract, shall not be objected to on the trial of the cause, without like notice being given of the intended objection; and upon such notice being given, the court, or judge, at any time before the trial of the cause, may order, on such terms as may be thought proper, that the name of one or more of the defendants, be added, or struck out, if it shall appear that injustice will not be done by such amendment."

[21]MISS. CODE ANN. 1930, §§ 514, 515, which read as follows:

"514. The non-joinder or mis-joinder of a plaintiff shall not be objected to by the defendant at the trial, unless he give written notice thereof with his plea, stating the name of the person alleged to be omitted or improperly joined; and the court or judge, at any time before the trial of the issue, whether of law or fact, may allow the declaration and writ to be amended so as to obviate the objection, upon such terms as may be proper.

"515. The non-joinder or mis-joinder of a defendant in any action upon contract shall not be objected to by a defendant on the trial of the cause unless he give written notice thereof with his plea, stating the name of the person

change made by the Code of 1890, which left off the concluding clause of sections 1511 and 1512, and the corresponding sections in the subsequent codes; but curious to say, no one of the many decided cases make mention of any change wrought in the procedural law by leaving out the words, *"or demurrer."* In fact, from a reading of the cases, the research worker would never get the information that a vital change had been made in these sections.

A study of this seemingly slight change in the structural form of the sections, together with the decided cases, convinces the mind it brought about a most important alteration of the remedial procedural law. The statutes, as a whole, have received but scant notice at the hands of the court in dealing with questions of remedy involved in the problem being discussed. There has been no comprehensive construction of the statutes by the court for the purpose of giving clear and definite information to the bar as to the part they play in the procedural scheme after the alteration mentioned. It is the business of the legislature to improve on the defects of the common law, and however much we may venerate that system, our veneration should not extend so far as to induce us to protect, or attempt to shield, it against positive statutory enactment.

It is likewise the solemn duty of the court, when occasion arises, to construe and interpret such statutes, in order that the bar may not be forced to grope around in a dense fog of uncertainty concerning the correct rules of procedure.

The omission of the words *"or demurrer"* from sections 1511 and 1512 of the Code of 1880 unquestionably produced some change in the remedial procedural law in cases where there was present the question now under discussion. Unless the omission was a clear case of *casus omissus,* it must be presumed the legislature had some well defined object and purpose in view in making the change. It would not be reasonable to assume a want of intention and purpose on the part of the legislature concerning so important a matter. The problem at once arising is, what was the legislative intent and purpose?

Two theories have been advanced by the legal minds of the state as a solution of the question. One theory is that the legislature intended by omitting the words *"or demurrer"* from the statutes

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alleged to be omitted or improperly joined; and upon such notice being given, the court or judge, at any time before the trial of the cause, may allow an amendment to the pleading so as to obviate the objection, upon such terms as may be proper."

to revert to the original common law procedure in all cases where the non-joinder or mis-joinder appeared on the face of the pleadings. The argument is, that where a statute makes a change in the common law rules, as in the present instance, and is subsequently repealed, the superseded common law rule automatically becomes again operative without any mention of it in the repealing act.[22] This is a well established rule which needs no mention of authorities to sustain it.

Then, if there is a reverter to the common law rules on this point, with the omission of the words in question, whenever the non-joinder or mis-joinder appears on the face of the pleading and a demurrer is interposed by the defendant, and it is sustained by the court, the plaintiff's suit will be dismissed, and this necessarily so, because the court has no power under the common law rules to permit or allow an amendment of the declaration by the plaintiff. The statute on amendments will lend no aid in such cases.

Under this theory the mischief sought to be avoided by sections 1511 and 1512 of the Code of 1880, in part, comes into existence once more. The beneficence of the sections is partly destroyed and the dilatory method and procedure of the common law reestablished. Did the legislature intend such reactionary purpose? The trend of the legislative mind at the time the change was made was anything but reactionary. It was most decidedly towards a more modern system of practice and procedure—towards a simplified pleading with all common law forms abolished. This was a history making era under the wise and able leadership of Judge Campbell during which great legislative inroads were made into the old common law plan of procedure, resulting in a more flexible and simplified system of pleading. Methods just the opposite to reactionary methods were in the air and legislative minds.

A second theory has been advanced to the effect that it was the purpose and intent of the legislature in omitting the words "or demurrer" from sections 1511 and 1512 to still further simplify the procedure and create but one common form of remedy for taking advantage of a non-joinder or mis-joinder of parties plaintiff or defendant, namely, a plea in abatement with all the statutory requirements, regardless of whether the omission or improper joinder did or did not appear upon the face of the declaration or pleadings.

[22]Wolcott v. Shubert, 217 N. Y. 212, 111 N. E. 829 (1916); Sutton v. Mandeville, 23 F. Cas. 13650, 1 Cranch C. C. 115; Chadbourn v. Chadbourn, 9 Allen (Mass. 1864) 173.

This theory receives support from the fact, heretofore mentioned, that the whole trend of modern pleading and practice both in state and federal courts was, and is now, towards simplicity, flexibleness, and directness in the pleading in order that causes of action in the courts might be more expeditiously brought to trial on their merits.

The Code of 1880 stressed the importance of pleading substance rather than mere form as had long prior to that time been the case. The worship at the shrine of mere form, the shadow, when only substance was all important, had become intolerant to the common sense of legal and legislative minds at the time of the adoption of the Code of 1880. It is hard to conceive that the legislature surrounded with this atmosphere and the background set forth could have intended to take such a backward step, as would follow, if the defendant secured a favorable holding at the hands of the court after demurring. The plaintiff would be thrown out of court because of the want of power in the court to permit an amendment of the declaration, and further, deprived of his legal right to speedily proceed to trial on the merits of the case.

The fight before the Code of 1857 was adopted, and after its adoption, had been to give to the court power to allow the plaintiff to amend his declaration in such cases so that the case might proceed in a normal and common sense way to a trial on its merits.

It is further contended that the law making body having committed itself to the foregoing new plan of procedure and consistently adhered to it for a quarter of a century with most satisfactory and gratifying results intended by the change mentioned to strengthen the scheme established, rather than weaken it or break it down by a return to the common law system.

The legislature was emphasizing the importance of substance in the rules of pleading and abolishing, as far as practical, mere form, which loomed so large in the field of the common law. The goal toward which the legislature was driving was to develop a system of pleading that could most readily accomplish two things: (a) the statement of the proper issues in the case and (b) an expeditious trial on the merits.

The foregoing being the legislative mind, would it be a sound and reasonable construction of the statutes to say the legislature, by omitting the words, "or demurrer," meant to return to the common law rule in part? If the omission reestablishes the sway of

the common law, the anomalous situation is presented in which form rather than substance is all important in one part of the statutes, while, in another part, substance takes precedence over form. We would then have a statute which is in part fish and in part fowl.

It has been suggested heretofore that the omission of the words mentioned in the Code of 1880 was a mere *casus omissus* which has been repeatedly overlooked by subsequent legislatures. This is a possible, but a very doubtful, explanation.

Again it is urged that the very wording of these statutes (Code of 1880) lays paramount importance on the necessity of giving notice to the plaintiff.

The statute reads, "The non-joinder or mis-joinder of a plaintiff (or defendant) *shall not be objected to* by the defendant at the trial, unless he *gives written notice* with his *plea,* stating the names of the persons alleged to be omitted or improperly joined." (Italics are the writer's.) Then note what follows: "and the court or judge, at any time before the trial of the issue, whether of law or fact, may allow the declaration or writ to be amended so as to obviate the objection, upon such terms as may be proper."

The written notice mentioned in the statutes must be given with his *plea.* The requirement of written notice is mandatory if the defendant wishes to take advantage at the trial of the non-joinder or mis-joinder, and it is mandatory that it be given with the *plea. A demurrer is not a plea.*[23] There is no place in this section for the use of a demurrer as a remedy, unless the court, by judicial legislation, write it into the statute. The use of any other remedy is prohibited under the statutes, or specifically limited to a *plea.* The vice of a non-joinder or mis-joinder is to be objected to in the same way whether it appears on or off the face of the pleading. The statute takes no regard of the manner of its appearance. The only concern of the statute is: does the non-joinder or mis-joinder exist? If so, then it presents the remedy, and the only remedy, by which it may be taken advantage of. The statute is exclusive in the matter of remedy and must be strictly followed. If the foregoing constitute the fundamental and dominating underlying ideas in the statute, the proper construction must be that there was no intention or purpose on the part of the legislature, in making the omission, to return to the common law practice or procedure as to remedy. The legislative

[23]Merril v. Pepperdine, 9 Ind. App. 416, 36 N. E. 921 (1908).

intent is the law. Every form of remedy is a mere question of policy over which the legislature has entire control, so that the power to enforce the duty be not weakened.

It is still further contended, if the legislature meant by the omission to revert to the law in the respect mentioned, it most certainly would have, for the sake of clearness and certainty, written something into sections 1511 and 1512 sufficient to indicate its determination.

These sections, prior to 1880, had stood unchallenged for over a quarter of a century. The practice under the plan adopted by the statutes was satisfactory and efficient. During this long period, not one single case is reported by the courts which involved these statutes, insofar as the matter of remedy was concerned. This fact, to the writer's mind, is evidence that the plan worked well and that no confusion existed in the minds of the bar as to the proper practice. Immediately following the omitting of the words, *"or demurrer,"* from the statutes, cases began to appear in the supreme court disclosing the utmost confusion and doubt as to what was the proper procedure and practice, and this situation continues down to this time.

It is submitted that the contentions of the proponents of the second theory are upheld by a wealth of good common sense and practical reasons. It does not place too great a strain on the construction of Section 1511 or 1512 of the Code of 1880 to hold that the legislature intended by the omission of the words *"or demurrer"* to still further simplify the pleading in such cases by making the plea in abatement the proper pleading in all cases, regardless of whether the non-joinder or mis-joinder does or does not appear on the face of the pleadings.

This construction would clearly preserve to the court the power to allow or permit amendments of the declaration, as to the parties, if the plea is held good. It would insure a speedy trial of the case on its merits—the goal so much desired. It would likewise insure certainty as to the plan of pleading.

Such a plan of pleading prevails in several of the states, Maine and Pennslyvania in particular. In New York the ordinary motion is used in such cases, and no doubt other Code States follow New York in this particular.[24]

It might be of interest to briefly review some of the decided cases. The first case to come before the court after the adoption

[24]New York Civil Practice Act (1920) § 192.

of the Code of 1880 was *Stauffer v. Garrison,*[25] decided in 1883. This case was based on a sequestration bond. Some of the obligees who should have been made parties plaintiff were left off. The contents of the bond, together with the names of all parties in interest, fully appeared on the face of the plaintiffs pleading. There existed no confusion or doubt as to the names of the parties, nor their interest or right or obligation in the subject matter of the suit. Judge Campbell, in deciding the case, said, "The suit should have been in the name of all the parties, or their non-joinder accounted for on legal grounds. But as the defendant had not given written notice thereof with his plea, as required by section 1511 of the Code of 1880, the non-joinder of the plaintiffs was not available to him."

Under the facts, at common law, a demurrer would have been the proper pleading, as the non-joinder clearly appeared on the face of the pleading. Judge Campbell must have had in mind that section 1511 of the Code of 1880 intended to lay down the rule that a plea was the proper pleading to take advantage of the defect even though it appeared upon the face of the pleading. But consider the case of *Lewis v. State.*[26] It was alleged in this case that one Griggs, an obligor on a bond, was improperly omitted as a party defendant. Section 1134 of the Code of 1880 provides that any one or more of the obligors on a bond may be sued. The non-joinder in this case clearly appeared on the face of the pleadings. Judge Arnold in deciding the case said, "and the non-joinder appearing on the face of the declaration it should have been objected to by demurrer, and not by plea in abatement." It is submitted that the holding of the court in these two cases can be reconciled by no sort of legal gymnastics.

In *Walker v. Hall,*[27] an indorsee of a note sued the maker alone. There were two payees, and only one endorsed to the endorsee, who gave full value for the note. The payee who did not endorse was the wife of the payee who did endorse. She thought it unnecessary to endorse, as she was present when the husband endorsed with her approval. The reported case shows that the pleadings give all the salient facts, and the names of all interested parties, together with each's interest. The husband, sole endorsee, sued alone, and the defendant raised no question of non-joinder until the case reached the supreme court. Judge Arnold, delivering the opinion, said: "Section 1511 of the Code provides that no objection for non-

[25]Stauffer v. Garrison, 61 Miss. 67 (1883).
[26]Lewis v. State, 65 Miss. 468, 4 So. 429 (1888).
[27]Walker v. Hall, 66 Miss. 393, 6 So. 318 (1889).

joinder shall be made at the trial except in the manner therein specified, and that upon such objection being made, the court or judge shall allow the defendant or court to be amended by joining the party omitted."

In the *Lewis case, supra,* Judge Arnold had announced: "the non-joinder appearing on the face of the declaration it should have been objected to by demurrer." Taking these two cases, in each of which the non-joinder clearly and unmistakably appeared on the face of the pleadings, and in each of which the opinion was rendered by the same Judge, what comfort or satisfaction is given as to the proper method by which to take advantage of a non-joinder appearing on the face of the pleading?

In the case of *Jackson v. Dunbar,*[28] the pleadings fully disclosed all of the pertinent facts, the names of all interested parties together with each's interest in the subject matter of the litigation, but the parties were improperly joined as co-plaintiffs. Judge Campbell, speaking for the court, held it was necessary to raise the question of mis-joinder by plea and written notice therewith, as provided by section 1511 of the Code of 1880.

The *Darrill Case*[29] throws but scant light on the problem under discussion. It is impossible to determine certainly, from the reported case and briefs of counsel, whether the non-joinder mentioned did or did not appear on the face of the pleadings, but the interesting point is brought out by the court that, unless matter of non-joinder is raised, as the statute requires, in the lower court, it is waived, and cannot be taken advantage of on appeal to the Supreme Court.

The latest, and possibly one of the most important, cases involving a consideration of the subject being discussed is *Aven v. Singleton,*[30] decided in 1923. Judge Ethridge delivered a very strong opinion in this case. The facts stated in the plaintiff's declaration and the exhibits attached give a full and complete disclosure of the names of the parties in interest, their rights in the substantive matter involved in the litigation, and their connection with the action. A demurrer was filed by the defendant to the declaration. This demurrer, among other things, alleged there existed a mis-joinder of both plaintiffs and defendants. In passing on the point raised by the demurrer, Judge Ethridge said, "We do not think that the mis-joinder of either the plaintiffs or defendants can be raised by de-

[28]Jackson v. Dunbar, 68 Miss. 288, 10 So. 38 (1890).
[29]Darrill v. Dodds, 78 Miss. 912, 30 So. 4 (1901).
[30]Aven v. Singleton, 132 Miss. 256, 96 So. 165 (1923).

murrer, and if it is raised by plea, the court may allow any proper or necessary amendment necessary to bring the cause to trial between the parties; any necessary amendment being expressly permitted by section 775 Code of 1906 (sec. 558 of Hemingway's Code)."

These sections are set out in full in the body of the opinion and are precisely the same as sections 514 and 515 of the Code of 1930.

The court, in its discussion, makes clear these points: (1) the mis-joinder of either a party plaintiff or defendant cannot be raised by demurrer; (2) if raised by plea, as the statute requires, the court then has the power to allow all necessary amendments; (2) that the exercise of this power enables the court to bring the cause to trial between the parties with expedition. This opinion brings clearly before us the intent and purpose of the legislature in abolishing, through these statutes, the common law rule of procedure in such cases.

It is true the court says, "and if it is raised by plea," which implies it might be raised in some other manner, but the answer to this is, that if the plea with notice is not filed before trial, and the non-joinder or mis-joinder is brought to light on the introduction of the evidence, the defendant then may raise the question by a motion to non-suit the plaintiff, which would, under the common law rule, shut off all right to amend, and the case would be dismissed if the motion was sustained.

It will be noticed that the court says, "We do not think the mis-joinder of either the plaintiff or defendant can be raised by demurrer." This is a broad and significant statement which seemingly establishes a rule by the court based on the second theory heretofore mentioned. It is to be regretted that Judge Ethridge did not clear up the entire matter by an elaborate opinion covering and making clear every confused point of pleading in cases of the kind under discussion.[31]

CONCLUSION

There existed no uncertainty or doubt as to the proper practice and procedure in this state in cases of non-joinder and mis-joinder of parties plaintiff and defendant until the adoption of the Code of 1880.

The common law rules, which were fixed and certain, existed

[31]As to the question under discussion, note: Avera v. Williams, 81 Miss. 714, 33 So. 501 (1903); Stiles v. Inman, 55 Miss. 469 (1877); Williams v. Home Insurance Co., 168 Miss. 443, 151 So. 728 (1934).

until the adoption of the Code of 1857. Articles 43 and 44 of Section VI of the Code of 1857 brought about a drastic change in the procedure, but the change made produced no uncertainty. The legislative purpose and intent were perfectly clear. These sections reappear in the same form in the Code of 1871, as Sections 671 and 672. The fact that no cases arose during a period of seventy-eight years, 1817 to 1880, involving the direct questions under discussion clearly demonstrates an understanding, on the part of the bar, of the scheme of pleading, and shows that no confusion or uncertainty existed.

The Code of 1880 made a change, as pointed out in the body of the Article, which has resulted in great confusion as to the proper remedial procedure in the case of a non-joinder or mis-joinder of parties plaintiff or defendant. This was produced by the omission of the words "or demurrer" from Sections 1511 and 1512 of the Code of 1880.

From the beginning of the state government in 1817 until 1857, a period of forty years, only three cases arose which in any way bore upon the problem under discussion.[32] These three cases are clearly attributable to the Act of 1837 which, among other things, provided that in all actions on notes the holder must join as defendants the maker and all indorsers; in other words, all parties liable on the note were necessary defendants.

This Act changed the common law rule that the plaintiff had the right to sue each party liable on the instrument separately if he wished to do so.[33]

Common law remedies flourished during this period, with the exception mentioned; they were clear cut and well known to the bar and trial courts. It is true they produced at times unnecessary delay in reaching a trial on the merits of some particular case, but no confusion existed as to the correct procedure.

From the enactment of Articles 43 and 44, Section VI of the Code of 1857, until 1880, a period of twenty-three years, only one case arose which involved the remedy in a non-joinder or mis-joinder case, and this was in an incidental manner. The case is *Halsey v. Norton, et al.*[34] The vital question in the case was the proper joinder of parties plaintiff. The court, after settling that question, pointed out the remedy in such cases, a point not necessarily involved in the

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[32]See note 8.
[33]McMillan v. Sprague et al., 4 How. (Miss. 1840) 647.
[34]45 Miss. 703 (1871).

decision of the case; in fact, what was said about remedy was pure dicta.

Immediately following the adoption of the Code of 1880, which omitted the words, "or demurrer," from Sections 671 and 672 of the Code of 1871, cases began to appear in the Supreme Court which clearly and unmistakably indicated that a want of clearness existed as to the proper remedy in non-joinder and mis-joinder cases under sections 1511 and 1512 of the Code of 1880, the *Stauffer Case, supra,* being filed in the Supreme Court in the spring of 1883. The cases have continued in a perfect stream until this date, showing in a most conclusive manner confusion and uncertainty as to the proper remedy in such cases. During the twenty-three years following the adoption of the Code of 1880, something like ten cases came before the Supreme Court involving the question under discussion, as compared with only one case arising during the twenty-three years before that time. From 1880 to the present time, a period of fifty-five years, approximately twelve such cases have appeared in the Supreme Court.

The briefs of counsel filed in these cases exhibit abundant confusion in their minds as to the proper remedy in non-joinder and mis-joinder cases.

The decisions of the court have failed to clear up the confused condition. This paper deals only with cases arising in the circuit courts of the state. The practice in the chancery courts has been uniform, clear, and certain from the earliest days.

VENUE OF ACTIONS IN MISSISSIPPI

FORREST G. COOPER*

Most questions affecting the proper venue for causes of action are answered in the statutes of Mississippi. But the proper venue in cases against domestic corporations assumes unusual angles at times. It will be the main purpose of this article to discuss some of these exceptional cases.

Mississippi has special venue statutes applying to specific kinds of corporations. One of our statutes provides that suits against public utilities may be filed in any county through which such public utility company operates.[1] It is also provided that suits against a life insurance company must be brought either in the county where the loss occurs, or in which the beneficiary resides, but suits against insurance companies on other kinds of insurance than life insurance must be brought in the county where the loss occurs.[2] Suits against executors, administrators, or guardians, whether they be individuals or trust companies, who receive their appointment in this state, but who reside outside of the state, must be brought in the county of their appointment.[3]

If the suit involves land it may be filed in the county where the land or any part thereof may be. But if the land be in two or more counties, it must be filed in the county of the residence of the defendant, if the defendant resides in any county where any part of the land is located.[4] Of course, if the domestic corporation be jointly sued with another defendant, which co-defendant is a necessary party, the general corporation venue statutes do not apply; but in such cases the suit may be filed in the county of the domicile or residence of either, or in the county of the proper venue of the co-defendant.[5] This co-defendant must not, however, be brought in merely for jurisdictional purposes, but the cause of action against such defendant must be bona fide and the allegations in the declaration are not conclusive on venue questions. In the case of *Trolio v. Nichols*,[6] Justice Anderson, speaking for the court, said:

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[1] MISS. CODE ANN. 1930, § 496.

[2] MISS. CODE ANN. 1930, § 497.

[3] MISS. CODE ANN. 1930, § 498.

[4] MISS. CODE ANN. 1930, § 495.

[5] Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1919); Pan-Am Co. v. Pate, 126 So. 480 (1930).

[6] 160 Miss. 611, 133 So. 207 (1931).

> "The right of a citizen to be sued in the county of his residence is a valuable right; it is a right of importance to him—it is not a technical right . . . . This is too valuable a right to permit the allegations of the plaintiff's declaration to be conclusive. Such a rule would furnish a convenient means for the plaintiff to fraudulently fix the venue of the action to suit his purposes."

The lower court will properly look beyond the pleadings when venue questions are timely raised in suits against two or more defendants and there determine if a co-defendant has been improperly brought in merely for venue purposes.[7]

Another exception to the general rule is in suits against public officers on their official bonds. Even though surety companies be co-defendants with such public officers, the suits must be brought in the county of the residence of the public officers, and if not brought in such county, the venue may be changed to his home county by timely application.

Provision is made in the statutes that, if the plaintiff shall file suit in a county not having venue of the action, the defendant may, if he be an individual,[8] remove the action to the proper county by application for a change of venue, but the Supreme Court of Mississippi has held that this statute is not applicable to domestic[9] or foreign[10] corporations.

These venue rights of defendants are not absolute but may be waived. If the defendant voluntarily appear to defend, on its merits, an action brought in a county not having jurisdiction of the defendant or of the cause of action, his jurisdictional rights have been waived. If in such cases a plea to the merits is filed, this constitutes a waiver and the court has jurisdiction. Such venue rights constitute an affirmative defense which must be timely asserted. It is the recognized practice that the proper procedure in such cases is for the defendant, first, to file a plea in abatement setting up the lack of venue. This, of course, should be done before any plea to the merits or any motion is filed. If, however, a general issue plea is filed the defendant may apply to the court to withdraw from the files the pleas to the merits or other pleadings filed. When this is done the court has the power to permit such withdrawal. This leaves the case as if no plea or motion was ever filed, and by permission of the court, the defendant may then file his plea in abate-

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[7]Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930).
[8]Miss. Code Ann. 1930, § 495.
[9]Morrimac Veneer Co. v. McCalip, 129 Miss. 671, 92 So. 817 (1922).
[10]Hercules Power Co. v. Tyrone, 155 Miss. 75, 124 So. 74 (1929).

ment, which is timely at that stage of the proceedings. Such withdrawal is not a matter of right, but is only permitted in the discretion of the trial judge. Such permission is usually granted unless the defendant has been guilty of gross negligence, or unless the premature filing of the plea to the merits has prejudiced the rights of the defendant. Of course, if the plaintiff amends his declaration in a material way after plea to the merits is filed to the original declaration, the motion to withdraw such general issue plea and to file a plea in abatement raising venue questions is almost granted as a matter of course.

Our court follows the general rule that the right of the defendant to have his case tried in the county of the statutory venue is a substantial right and a privilege not to be denied him except in the case of clear and positive waiver.

If the defendant is a domestic corporation, not coming within the special classifications named above, the suit must be brought in the county of its domicile or in the county where the cause of action may occur or accrue. The question of domicile has never given any special trouble because a corporation can have but one domicile, even though it has many branch offices and does business in many counties.

It is sometimes difficult, however, to determine where a cause of action occurred or accrued. A cause of action in some cases consists of a series of essential acts which occur in two or more counties. Some causes of action are transitory.

The Mississippi Supreme Court had this statute under consideration in the case of *Masonite Corporation v. Burnham.*[11] The defendant polluted a running stream in the Laurel District of Jones County, which pollution continued through said stream into the Ellisville District in said county and there injured the lands and property of the plaintiff. Suit was brought in the Ellisville District. The defendant, by plea in abatement, raised the venue point that the cause of action accrued where its alleged negligent act was done. The Supreme Court held that the cause of action was transitory and continuing and that the injuries did not accrue to the plaintiff until the waters passed out of the Laurel District into the Ellisville District; that, since the polluted waters were entirely harmless so far as the plaintiff was concerned until they reached the Ellisville District, the cause of action accrued to him in the Ellisville District.

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[11]164 Miss. 840, 146 So. 292, 91 A. L. R. 752 (1933).

Many cases, however, are not so easy of solution. For instance, in malicious prosecution cases, where the prosecution is started in one county and the arrest is made in another, does the cause of action occur or accrue to the plaintiff in the county of his arrest or in the county where he is maliciously prosecuted, or does the cause of action accrue to him in either of said counties? At the time this is written, I do not find that this question has been answered by our Supreme Court.

But since the above was written the Supreme Court, on December 1, 1935, in the case of *Grenada Bank v. Petty*,[12] decided that the county where the prosecution occurred has the proper venue, even though the arrest occurs in a different county. The court declined in that case to pass on the question of whether an arrest was a material element in malicious prosecution, the solution of that problem not being necessary for its decision.

The answer is elemental in the case of false arrest or false imprisonment because, in such cases, the arrest is the chief part of the cause of action, and the county of the arrest is certainly the proper county in which to bring suit. But in a malicious prosecution case the essentials, according to most courts, include criminal charge, maliciously brought, without probable cause, from which an acquittal or dismissal of the charge results. Arrest is not listed as one of the essential elements, but the arrest usually follows and always aggravates and increases the amount of damages. The arrest is the proximate result of criminal charge, although it is not necessary for an arrest to follow before malicious prosecution can be maintained. The earliest case we can find on this venue question is the case of *Hubbard v. Lord*,[13] in which that court, construing a venue statute similar in substance to our statute, held that an arrest was not an essential element of malicious prosecution and that in a case where the arrest took place in one county and the prosecution in another, that the county of the arrest did not have venue of an action for malicious prosecution. That early case has been cited approvingly, or its principles adhered to, in a long list of cases from Texas and other states.[14]

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[12]164 So. 316 (1935).

[13]59 Tex. 384 (1883).

[14]Raleigh v. Cook, 60 Tex. 438 (1883); Hilliard v. Wilson, 65 Tex. 286 (1886); Leach v. Stone, 264 S. W. (Tex. 1924) 620; Morgan v. City Bank, 277 S. W. (Tex. 1925) 403; Jefferson v. Williams et al., 286 S. W. (Tex. 1926) 614; Austin v. Bearden, 18 S. W. (2d) (Tex. 1929) 857; Smith et al. v. Rogers, 34 S. W. (2d) (Tex. 1930) 312; Compton v. Elliott, 55 S. W. (2d) (Tex. 1932) 247; Rooney et al. v. Murphy, 62 S. W. (2d) (Tex. 1933) 659;

There are many other venue cases discussing the proper venue where there is doubt as to the proper county, but most of them have statutes providing that suits may be brought either "where the injury is done," "where the damages are inflicted," or "where the trespass or some part thereof is committed." Such authorities therefore are of little value.

An interesting sidelight on this question, as it relates to the right to a change of venue, was discovered in reading the New York cases. We find that New York had a rule that a change of venue in the discretion of the trial judge may be granted for the convenience of the parties litigant and a majority of the witnesses.

Another unsual type of venue question arises in libel cases, particularly against newspapers. A newspaper containing libelous matter may be published in one county and have a large circulation in many other counties; or the newspaper may be published in one state and have wide circulation in many counties of another state. When such newspaper, published in one county, containing libelous matter, is circulated in another county, where does the cause of action occur or accrue? Does it occur where the libelous matter is published, or where the libelous matter is circulated? Mississippi does not seem to have decided this question. While there is authority to the contrary, a majority of the cases examined seems to hold that, if the newspaper is generally circulated in the county of the residence of the plaintiff where he is known, that the cause of action accrues to him in that county. In other words, the cause of action in that type of case is in a way transitory, and does not accrue to the plaintiff until it is circulated among the plaintiff's friends and acquaintances. However, Alabama is committed to the contrary rule, and most of the states deciding this question have venue statutes unlike that of Mississippi. It was held in the case of *State v. Priver,*[15] that a newspaper, published outside the state of Washington, which circulates a libel in the State of Washington, may be sued in the county of the residence of the plaintiff, provided the libelous matter was circulated in that county. In the case of *Vicknair v. Daily States*

Smith v. Rogers, 34 S. W. (2d) (Tex. 1930) 312; Plum v. Forgay Lbr. Co., 4 P. (2d) (Cal. 1931) 894; State Ex. Rel. News Publishing Co. v. Park, 165 N. W. (Wis. 1917) 289; Kalberg v. Greiner, 8 P. (2d) (Mont. 1932) 799; Age-Herald Publishing Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921); Ballard v. Cash, 230 S. W. (Ky. 1921) 48; Coffey v. Myers, 84 Ind. 105 (1882); Hammill v. Mack Int. Mot. Truck, 141 Atl. (N. J. 1928) 775; Stewart v. First Nat. Bank, 18 P. (2d) (Mont. 1933) 801; Seigmund E. Halberstadt v. N. Y. Life Ins. Co., 86 N. E. (N. Y. 1909) 801; Holmes v. Johnson, 44 N. C. 44 (1852); Ruston v. Biddle, 43 Ind. 515 (1873).

[15]74 Wash. 96, 132 Pac. 858, 49 L. R. A. (N. S.) 914 (1913).

Pub. Co.,[16] it was held that a newspaper can properly be sued in the parish where libelous matter is circulated and cannot obtain a change of venue to the parish of its publication. The author believes the better rule to be that, under the Mississippi statute, only the county where the libelous matter is published has venue of the action.

Another type of case may be illustrated by the situation under which an article is defectively manufactured in one county and is sold to a dealer in another county, who in turn resells it to a man who is injured. Does the cause of action occur in the county of defective manufacture or in the county where the negligence results in damage? In the case of *Peaslee v. McMath*,[17] the Supreme Court of Kentucky considered such a case. Kentucky has a statute giving venue to the county "where the tort is committed." Under such statute is was held that no actionable tort could have been committed until injury and, therefore, venue was in the county where the tort was in fact committed by the infliction of injury.

Another type of venue case involving an unusual point is the case of *Smith v. Southern Railway Co.*[18] In that case a car of dynamite exploded in Kentucky, adjacent to the Tennessee line, and injured real estate in Tennessee, the explosion and injury being simultaneous. It was held that Kentucky had jurisdiction.

Justice Ethridge, in the case of *Clark v. L. & N. R. R. Company*[19] states this of venue:

> "A state has the right to fix venue of actions according to its conception of what is necessary to best administer justice in its courts. It is not necessary for it to fix the venue of an action in any one particular place. It cannot unreasonably discriminate between classes of defendants, but, having reference to reasonable conditions, it may fix the venue of actions according to its judgment of convenience, justice, etc. The state is the judge so long as it does not unreasonably discriminate between litigants or classes of litigants."

Incidentally, the case of *Clark v. L. & N. R. R. Company, supra,* involved an unusual question of venue. The complainant filed an attachment in chancery against the L. & N. R. R. Company and joined as co-defendants therein several other railroad companies, on the theory that they were indebted to the L. & N. Said suit was also based on the fact that the L. & N. R. R. Company, a non-resident

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[16] 144 La. 809, 81 So. 324 (1919).
[17] 148 Ky. 265, 146 S. W. 770, 39 L. R. A. (N. S.) 465 (1912).
[18] 123 S. W. 678, 26 L. R. A. (N. S.) 927 (1909).
[19] 158 Miss. 287, 130 So. 302 (1930).

corporation, owned property in the coast counties of Mississippi. However, the suit was filed in the chancery court of Wayne County, and the L. & N. R. R. Company had no property in that county. None of the other defendants, except one railroad, had any property in Wayne County. The complainant was seeking to recover judgment against the L. & N. R. R. Company and to subject effects in the hands of the co-defendants belonging to the L. & N. The Supreme Court, by a four to two decision, decided that the suit could be maintained in Wayne County, even though the railroad company had no lines or property in that county, and that jurisdiction of the cause was given on the ground that a co-defendant was served with process. The only defendant upon whom process was had in Wayne County was a mere garnishee, and no original recovery was sought against this defendant. Of course, our court held that such an unusual turn of venue could only arise in an attachment in chancery cases against a non-resident corporation.

In conclusion, I believe the venue statutes of Mississippi should be added to and clarified, so as to settle the matter of venue in transitory causes of action, in libel cases, in malicious prosecution cases, and in defining what is meant by the accrual of causes of action which consist of more than one act, occurring in more than one county.

A SPECIAL PRIVILEGE TO THE CRIMINAL—HIS IMMUNITY UNDER THE RULE SUPPRESSING PROOF OF CRIME OBTAINED BY AN OFFICER TRESPASSING ON PREMISES IN POSSESSION OF THE CRIMINAL

J. B. Hutton, Jr.*

At nightfall of October 20, 1927, several unknown men rode in an automobile to the home of a man who was to be a witness, in a criminal case, for the state. One of the unknown men called to the witness for the state, and the witness walked toward the highway. When he came near to the highway, he was shot to death with four loads of buckshot. The murderers escaped unseen.

Four, empty, twelve-gauge, shot-gun shells were found by the body of the slain man. Later the guns which had been used were found, being identified from the marks of the gun on the empty shells; and it was learned that the owners of the gun had been seen in a car with the defendant the day before the murder.

Still later, an officer searched the defendant's house by authority given in a warrant to search for liquor. The officer found, in a trunk, shells of the size found by the body of the victim, which shells were loaded with buckshot of the kind and size found in the body of the slain man.

The defendant was tried for murder. The foregoing evidence was introduced, in addition to other evidence of guilt; and the jury found the defendant guilty of murder.

On appeal it was held that the officer committed a technical trespass in taking the shells from the trunk, because he was not authorized to find proof of murder, but was merely authorized to search for liquor; and because the evidence was obtained by the officer illegally, the introduction of it at the trial was reversible error. Hence the judgment was reversed.[1]

This strange ruling naturally leads one to ask: "How did this become the law of the State of Mississippi? Why is there any such rule in a civilized state? What is the rule?"

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*Member of the Jackson, Mississippi, Bar.

[1]Cofer v. State, 152 Miss. 761, 118 So. 613 (1928); 158 Miss. 493, 130 So. 511 (1930).

The Supreme Court of Mississippi enacted this rule in 1922.

But in enacting this strange rule which was subsequently applied in the Cofer case, the court was divided, three against three.[2] Hence it appears that this rule does not receive the support of even a numerical majority in the very court that permits it to stand, and no one can maintain that the rule is sheltered by the authority of the entire court or shares the prestige of the entire court. While three judges voted for the new rule, three equally capable and conscientious judges opposed it and exposed its fallacy. Therefore, the rule cannot be justified by a blind appeal to authority, but it must stand on its merits, if any, and must be tested by reason and conscience.

THE RULE, ITS SCOPE AND CONTENT

The rule applied in the Cofer case was established formally in the case of *Tucker v. The State,*[3] and abrogated the rule of the common law theretofore in force in Mississippi.[4]

The common law courts admitted evidence obtained by illegal search, punished the criminal whose crime was proved by such evidence, and also punished the person trespassing or making an unlawful search or seizure. Thus complete justice was done to all parties concerned, in accordance with the principle, on which civilized states rest, directing that each one be accorded his just due.

At common law the murderers of John Pruitt, the witness for the state, would have been punished for murder; and the person who took the cartridges unlawfully would be subject to punishment for so doing.

The rule of the Tucker case, which was applied in the Cofer case, suppressed proof of a murder, lest the state seem to be guilty of the theft of a shell.

The complications of the rule are extensive. For convenience, the following summary is given under separate heads.

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[2]Owens v. State, 133 Miss. 753 at p. 789, 98 So. 233, at p. 240 (1923).

[3]128 Miss. 211, 90 So. 845 (1922).

[4]The court stated in Pringle v. State, 108 Miss. 802, 67 So. 455 (1915), that the common-law rule obtained in this state; and did not discuss the legality of the mode of taking the evidence in question, since this is immaterial under the common-law rule. In a later decision an attempt is made to show that this ruling is dictum because the facts regarding the mode of taking the evidence are not stated in the decision. However this may be, it is beyond dispute that the common-law rule admitted illegally obtained evidence, Leggett v. Tollenvey, 14 East 302; and that the common-law rule prevailed in this state until the court abrogated it by enacting the new rule, Mississippi being a common-law state.

1. Any circumstantial evidence of crime, which an officer of the state obtains while trespassing, is inadmissible in evidence, no matter how slight the trespass or how enormous the crime thereby discovered.[5]

No knowledge of a crime which an officer may secure while committing a technical trespass can be revealed by the officer as a witness in court.[6]

But, so long as the officer of the state does not trespass on property or pursue anyone, he may observe, or even eavesdrop; and he may use the information obtained in this way in detecting crime; and such proof is admissible in evidence. Eavesdropping will not be imputed to the state.[7]

2. Any circumstantial evidence of a crime, or knowledge of a crime, which a private citizen gets by trespassing, or while trespassing, is admissible in evidence. The state cannot receive evidence stolen by an officer; but the state may knowingly receive stolen

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[5]Owens v. State, 133 Miss. 753, 98 So. 233 (1923) (whiskey distillery illegally seized; held inadmissible); Webb v. Sardis, 143 Miss. 92, 108 So. 442 (1926); Reynolds v. State, 136 Miss. 329, 101 So. 485 (1924), and Kennedy v. State, 139 Miss. 579, 104 So. 449 (1925) (a distillery may be taken as evidence of a crime without committing a trespass by officers legally on the premises with warrant to search for liquor, for there is no property in the still and it may be taken without trespassing).

[6]Tucker v. State, 128 Miss. 211, 90 So. 845 (1922) (testimony that defendant possessed a still and whiskey held inadmissible); Butler v. State, 129 Miss. 778, 93 So. 3 (1922) (testimony that defendant possessed liquor inadmissible); Taylor v. State, 129 Miss. 815, 93 So. 355 (1922) (details not given); Williams v. State, 129 Miss. 469, 92 So. 584 (1922) (testimony of finding a still excluded); Nicaise v. State, 141 Miss. 611, 106 So. 817 (1926) (testimony of finding liquor excluded); Orick v. State, 140 Miss. 184, 105 So. 465 (1925) (testimony that defendant possessed intoxicating liquor excluded); Gardner v. State, 141 Miss. 192, 105 So. 475 (1925); McCarthy v. Gulfport, 134 Miss. 632, 99 So. 501 (1924) (testimony that defendant possessed liquor); Smith v. State, 133 Miss. 730, 98 So. 344 (1923) (testimonial evidence of liquor in defendant's possession excluded); Jordan v. State, 135 Miss. 785, 100 So. 384 (1924) (testimonial evidence of possessing liquor gotten in searching defendant's house excluded); Butler v. State, 135 Miss. 885, 101 So. 193 (1924) (testimonial evidence of liquor defendant dropped in flight excluded); Iupe v. State, 140 Miss. 271, 105 So. 520 (1925) (testimonial evidence in liquor case); Davis v. State, 148 Miss. 531, 114 So. 343 (1927); State v. Patterson, 130 Miss. 680, 95 So. 96 (1923); Canteberry v. State, 142 Miss. 462, 107 So. 672 (1926) (testimonial evidence of carrying liquor on a horse); Bates v. State, 143 Miss. 772, 109 So. 730 (testimonial evidence of possessing liquor); Burnside v. State, 144 Miss. 405, 110 So. 121 (1926) (testimonial evidence of possessing liquor); State v. Messer, 142 Miss. 882, 108 So. 145 (1926) (testimony that the defendant possessed liquor excluded); Comby v. State, 141 Miss. 561, 106 So. 827 (1926) (testimonial evidence of possession of liquor on the person gained under a search warrant excluded).

[7]Goode v. State, 158 Miss. 616, 131 So. 106 (1930); Daniels v. City of Gulfport, 146 Miss. 517, 112 So. 686 (1927); Goodman v. State, 158 Miss. 269, 130 So. 285 (1930); Ford v. Jackson, 153 Miss. 616, 121 So. 278 (1929); Farmer v. State, 150 Miss. 776, 116 So. 884 (1928).

evidence, after being put on notice by objection of the party affected, if a private citizen steals the evidence or obtains testimonial knowledge through a trespass.[8]

It seems to the author that there is no difference between the reception of evidence stolen by an officer and that stolen by a private citizen, and that consistency would compel the admission or the exclusion of both alike.

3. Federal officers, although not officers of the state, are treated as state officers, and evidence illegally obtained by them is not admissible in a state court.[9]

It seems that if the distinction, made by the court in the Carter and Hampton cases, between searches by officers and searches by private persons, is valid; then, since federal officers are not officers of the state and are not subject to the control of the state, the acts of federal agents should not be imputed to the state any more than the acts of private citizens. However, the court holds federal officers to be agents *in* the state.

4. The validity of the search warrant and the legality of the search is in issue, and is to be tried by the court;[10] whenever the defendant objects to the introduction of evidence gotten by officers, the evidence will be excluded, whether real or testimonial, if the search was not made in compliance with the regulations governing searches.[11]

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[8]Carter v. State, 161 Miss. 710, 138 So. 343 (1931); Hampton v. State, 132 Miss. 154, 96 So. 165 (1923).

[9]Little v. State, 171 Miss. 818, 159 So. 103 (1935).

[10]Holley v. State, 144 Miss. 726, 111 So. 139 (1927).

[11]Morton v. State, 136 Miss. 284, 101 So. 379 (1924) (variance of affidavit and warrant held fatal); Vaughn v. State, 136 Miss. 314, 101 So. 439 (1924) (search of car not described with particularity held bad, the ownership being in the defendant's companion at the time of the rum running and arrest); Miller v. State, 129 Miss. 774, 93 So. 355 (1922) (search warrant held invalid where person and place were not named or described), and to the same effect, Parkinson v. State, 145 Miss. 237, 110 So. 513 (1926); Taylor v. State, 129 Miss. 817, 93 So. 355 (1922) (search warrant is essential to valid search, its omission fatal error, and evidence obtained is inadmissible), and to same effect, King v. State, 147 Miss. 31, 113 So. 173 (1927); Rignall v. State, 134 Miss. 169, 98 So. 444 (1923) ("premises" of a named defendant is too indefinite a description in a search warrant and hence the search is illegal and any evidence gotten is inadmissible); to same effect as the latter case are Strangi v. State, 134 Miss. 31, 98 So. 340 (1924); Fatimo v. State, 134 Miss. 175, 98 So. 537 (1924); Taylor v. State, 134 Miss. 110, 98 So. 459 (1924) (and outhouse cannot legally be searched under a warrant to search the residence); Spears v. State, 99 So. 361 (1924) (warrant blank as to the place to be searched is invalid); Falkner v. State, 134 Miss. 253, 98 So. 691 (1924) ("possessions" under Section 23 of the Constitution extends to all property; here woodland owned by the defendant, and a warrant is necessary for the search of the woods), to same effect is Barnard v. State, 155 Miss. 390, 124 So. 479 (1929); Toliver v. State, 133 Miss. 789, 98 So. 342 (1923) (a car can

Real and testimonial evidence obtained by a search of an officer is inadmissable unless the affidavit and the search warrant are produced in court,[12] or unless the affidavit and warrant are lost and the loss is accounted for.[13]

When introduced, the affidavit is not traversable.[14] However, if the affidavit was based on knowledge of an officer gotten by an

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be searched when one in it is legally arrested, and liquor found may be used in evidence); Davis v. State, 144 Miss. 551, 110 So. 447 (1926) (one who occupies land with the consent of the owner is similarly immune); Spears v. State, 99 So. 361 (1924) (search warrant invalid because supporting affidavit did not describe place to be searched with sufficient particularity; hence any evidence thus obtained is inadmissible); Comby v. State, 141 Miss. 561, 106 So. 827 (1926) (search warrant to search the person is invalid); to same effect Duckworth v. Taylorsville, 142 Miss. 440, 107 So. 666 (1926); Faulk v. State, 127 Miss. 894, 90 So. 481 (1922) (defendant's permission to search without warrant legalized the search, and the evidence is admissible); but mere silence is not a waiver, Boyd v. State, 164 Miss. 610, 145 So. 618 (1933); Reynolds v. State, 136 Miss. 329, 101 So. 485 (1924) (where officers are legally on a place with warrant to search for liquor, they may take a still without trespassing, for it is not property, and the evidence is admissible); Love v. State, 142 Miss. 602, 107 So. 667 (1926) (a search on probable cause to believe a felony is being committed is legal although no warrant is obtained, and evidence of incest thereby obtained is admissible); Carnaggio v. State, 143 Miss. 694, 109 So. 752 (1926); Turner v. State, 133 Miss. 738, 98 So. 240 (1923) (affidavit for search which omits the words that the affiant "does believe" etc., is invalid, and hence the Tucker rule applies); Palmer v. Lumberton, 153 Miss. 886, 122 So. 199 (1929) (search warrant issued by mayor of a town is invalid where a city judge had been elected), to same effect where clerk of city police court issued a warrant, Jackson v. Howard, 135 Miss. 102, 99 So. 497 (1924), likewise, Porter v. State, 135 Miss. 789, 100 So. 377 (1924); Banks v. Jackson, 152 Miss. 844, 120 So. 209 (1929) (street number of a house is sufficient description of a place; description of person may be given as unknown); to same effect as preceding case, Loeb v. State, 133 Miss. 833, 98 So. 449 (1923); Forshee v. State, 152 Miss. 566, 120 So. 462 (1929) (a mistake in a description otherwise definite and certain may be ignored as immaterial); Myers v. State, 158 Miss. 554, 130 So. 741 (1930), and Washington v. State, 167 Miss. 226, 145 So. 736 (1933) hold that arrests of motorists without tag on car on information and belief car was stolen are illegal, and evidence of liquor found is inadmissible; Taylor v. State, 137 Miss. 217, 102 So. 267 (1924) (a warrant served after the return day is invalid, and evidence thus gotten is inadmissible); Bufkin v. State, 134 Miss. 1, 98 So. 452 (1924) (liquor search warrant returnable less than five days from issuance is valid, and evidence is admissible under it); Powell v. State, 146 Miss. 677, 111 So. 738 (1927), Buckley v. State, 150 Miss. 808, 117 So. 115 (1928); McSwain v. State, 158 Miss. 643, 130 So. 696 (1930) (a warrant blank as to time, or returnable to a day already past is invalid and evidence gotten under it is inadmissible); Dawsey v. State, 144 Miss. 452, 110 So. 239 (1926) (search warrant by a justice of the peace is invalid); Keys v. State, 155 So. 574, 124 So. 789 (1929) (a policeman may serve, in the municipality, a justice of the peace's search warrant, and the evidence gotten under it is admissible).

[12]Cuevas v. Gulfport, 134 Miss. 644, 99 So. 503 (1924) (liquor found in house excluded); Wells v. State, 135 Miss. 764, 100 So. 674 (1924); Nelson v. State, 137 Miss. 170, 102 So. 166 (1924); Pickle v. State, 151 Miss. 549, 118 So. 625 (1928).

[13]Wells v. State, 135 Miss. 764, 100 So. 674 (1924); Bond v. State, 164 Miss. 610, 145 So. 618 (1933).

[14]Sykes v. State, 157 Miss. 600, 108 So. 753 (1930).

illegal search, the warrant issued on such affidavit is invalid and a search under it is illegal. This was held in a case in which the officer left a deputy on the premises searched while he secured the warrant and returned to the place searched. The original illegality tainted the whole procedure.[15]

But no inquiry will be made on trial as to whether evidence obtained by illegal search was introduced before the grand jury in initiating the proceedings.[16] The original illegality does not taint the whole procedure.

5. Property that is owned or occupied by the defendant alone, or with others, is not subject to search without a warrant, generally, and evidence obtained by a search by officers without a warrant is inadmissible.[17] But if the place is not owned or occupied by the defendant, evidence obtained by officers' unlawful search may be used against the defendant, as where a man concealed a distillery in wood not owned or occupied by him.[18]

6. Reasonable searches and seizures by officers without warrants are legal, and evidence thus obtained is admissible. The reasonableness of a search without a warrant is a judicial question, to be determined at the trial and not previously.[19]

A statute authorizing the search of vehicles, without a warrant, when an officer has reason to believe and does believe liquor is being transported therein is constitutional; and evidence thus obtained is admissible.[20]

Such circumstances as would lead a reasonable man to believe a crime is being committed constitute probable cause for belief by an officer, and on such belief a search without a warrant is lawful.

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[15]Robinson v. State, 136 Miss. 850, 101 So. 706 (1924); Jordan v. State, 135 Miss. 785, 100 So. 384 (1924); Duncan v. State, 152 Miss. 209, 119 So. 179 (1928).

[16]Blowe v. State, 130 Miss. 112, 93 So. 577 (1922).

[17]Lovern v. State, 140 Miss. 635, 105 So. 759 (1925); Brewer v. State, 140 Miss. 635, 105 So. 759 (1925); Brewer v. State, 142 Miss. 100, 107 So. 376 (1926); Harrell v. State, 140 Miss. 737, 106 So. 268 (1925); Sanders v. State, 141 Miss. 615, 106 So. 822 (1926).

[18]Ashley v. State, 150 Miss. 547, 117 So. 511 (1928); Falkner v. State, 134 Miss. 253, 98 So. 691 (1924).

[19]Holmes v. State, 146 Miss. 351, 111 So. 860 (1927); Ingram v. State, 146 Miss. 303, 111 So. 362 (1927); McNutt v. State, 143 Miss. 347, 108 So. 721 (1926).

[20]Moore v. State, 138 Miss. 316, 103 So. 483 (1925) (where an officer telephoned another that a car with a specified tag number was running rum, the belief of the searching officer rested on probable cause); see also King v. State, 151 Miss. 580, 118 So. 413 (1929), where search was made on probable cause; in accord with Moore v. State, Arnold v. State, 153 Miss. 299, 120 So. 731 (1929), sight and smell of liquor constituting probable cause, White v. State, 159 Miss. 503, 132 So. 599 (1931), Eady v. State, 153 Miss. 691, 121 So. 293; Pickett v. State, 139 Miss. 529 (1925).

Mere information by a third person without more is insufficient.[21] For example, information from a citizen that a Ford car from Clay County, with a Clay County number on its license plate, driven by negroes, is running rum into another county, and will make a trip to that county on a specified day and at a specified time, is not sufficiently definite to warrant belief that a Ford car from Clay County driven by negroes which came to the designated place at the designated time is carrying liquor; and a search on such information is illegal; and the evidence gotten in such search is inadmissible.[22]

But the affidavit on which a formal warrant is issued need not be based on personal knowledge. Information and belief are sufficient.[23] Hence, the difference between a search on information of a third party, and one on an affidavit on information of a third party produces different results.

7. A statute,[24] authorizing search of any house or place in which an officer knows, or has reason to suspect, any person to be guilty of violating the law against gambling is unconstitutional; and evidence thus gotten is inadmissible against the owner of the house searched, but is admissible against his guests.[25]

8. An arrest without a warrant is permissible if there is probable cause to believe a felony has been committed by the person arrested, and evidence of guilt secured after such arrest is admissible if the court finds for the state on the issue of probable cause. There is a similar holding in cases in which a misdemeanor is committed in the presence of an officer.[26] This ruling was applied in cases in which burglar's tools, devices for altering license plates of automobiles, and distilleries were discovered after such arrests.

The existence of probable cause is in issue when the evidence is objected to, and a witness must disclose the identity of the informer against the criminal before proof can be given which was

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[21]Smith v. State, 160 Miss. 56, 133 So. 240 (1931).

[22]Lenoir v. State, 159 Miss. 697, 132 So. 325 (1931); see also Castillow v. State, 160 Miss. 473, 135 So. 205 (1931); Patton v. State, 160 Miss. 274, 135 So. 352 (1931).

[23]State v. Quintini, 76 Miss. 498 (1876); Loeb v. State, 133 Miss. 883, 98 So. 449 (1923).

[24]Miss. Code Ann. 1930, § 1235.

[25]Polk v. State, 167 Miss. 506, 142 So. 480 (1932).

[26]Bird v. State, 154 Miss. 493, 122 So. 539 (1929); Mapp v. State, 148 Miss. 739, 114 So. 825, and 152 Miss. 298, 120 So. 170 (1929); Watson v. State, 166 Miss. 194, 146 So. 122 (1933); Fletcher v. State, 159 Miss. 41, 131 So. 251 (1930); Chrestman v. State, 148 Miss. 673, 114 So. 748 (1927).

obtained as a result of the information.[27] This ruling is not to be confused with the rule of confrontation of the accused by witnesses, for the defendant had been confronted with the accusing officer, he having testified in open court. The present refinement requires the witness to the incriminating facts, not merely to disclose the clues and the circumstances which led to his belief that the accused was guilty of having committed a felony, but also to disclose the identity of the persons who assisted in the investigation of the case. As a result, the personnel of the enforcement agencies are subjected to the danger of death at the hands of bands of criminals, and the future usefulness of government agents is seriously impaired by reason of the publicity given to their efforts to detect crime. The fate of John Pruitt, a witness for the state, is an illustration of the practical problem under discussion, and should lead to a careful consideration of the question. It seems to the writer that the accused has all he is entitled to when he is confronted with witnesses who testify directly to the matters showing the accused's guilt; and that it is none of the business of the accused to know what persons took part in directing the officer's attention to the proof of guilt. The guilt or innocence of the accused is the one issue in the case that is of paramount importance; the disclosure of the personnel of the enforcement agencies should not be insisted on.

REVIEW OF THE REASONS ALLEGED TO SUPPORT THE NEW RULE

I.

The court alleged that the admission of evidence gotten by the illegal search by an officer of a defendant's property is "tantamount" to compelling a defendant to give testimony against himself.

"We have construed Section twenty-six in connection with Section twenty-three and have held that it is compelling a defendant to testify against himself when the evidence is unlawfully obtained by a search or an arrest by an officer without authority of law."[28]

"It would be just as logical and just as righteous to permit evidence extorted by torture to be received on trial of a defendant," when the defendant had been tortured until he could "stand it no

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[27]Hamilton v. State, 149 Miss. 251, 115 So. 427 (1928); Brown v. State, 149 Miss. 219, 115 So. 436 (1928); Ford v. Jackson, 153 Miss. 622, 121 So. 279 (1929); Perry v. State, 150 Miss. 293, 116 So. 430 (1928).

[28]Fulton v. Philadelphia, 168 Miss. 30, 148 So. 346 (1933).

longer."[29] A man's home should not be compelled to give evidence against himself.[30]

Confessions extorted by torture are excluded because they are notoriously untrue. Evidence obtained by a search without a warrant is not untrustworthy. The victim of torture will say whatever is necessary to relieve him from the agony of torture. But traces and real evidence of crime, and testimonial knowledge of crime gotten by a trespasser, are not affected by the formalities of the search or the reasonableness of the belief that an entry should be made without a warrant.

For example, the truthfulness of the officer who testified in *Love v. State*[31] that he found the defendant in a house of assignation, naked and in bed with a female relative of the defendant, is not affected one way or another by the question whether or not he had probable cause to believe a felony was being committed, and so was justified in entering the place without a warrant.

To anyone who considers the operative facts of cases, this identification of evidence gotten by illegal searches with forced confessions will be accepted as accurate, and the reasoning drawn therefrom will be considered valid, only when a house, upon being tortured by illegal entry, spawns untrue bits of circumstantial evidence and falsely enacts before the intruder the crime which the intruder is asked to reveal later, in order to be freed from the torment of unlawful intrusion. Then, and not until then, will it appear that the use of evidence of crime gotten by unlawful search is equivalent to confessions wrung from the agonized victims of the torture chamber, and that such evidence should be rejected as untrustworthy according to the rules of logic and righteousness.

The historic case which gave the basis of the modern common-law rule excluding forced confessions distinctly recognizes that torture does not ordinarily extract the truth from its victims. The court said:[32] "It is a mistaken notion, that the evidence of confessions, and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed. The idea is novel in theory and would be as dangerous in practice as it is repugnent to the general principles of criminal law. Confessions are received in evidence or rejected as

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[29]Orick v. State, 140 Miss. 184, 105 So. 465 (1925).
[30]Tucker v. State, 128 Miss. 211, at 223, 90 So. 845, at 847 (1922).
[31]142 Miss. 602, 107 So. 667 (1926).
[32]Warickshall's case, Old Bailey Sessions, 1 LEACH CR. L. (3rd ed. 1783) 298.

inadmissible, under a consideration whether they are, or are not, entitled to credit. . . . A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.

"This principle respecting confessions has no application whatever as to the admission or rejection of *facts,* whether the knowledge of them is obtained in consequence of an extracted confession, or whether it arises from any other source; for a fact, if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. . . . The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are distinct and independent of each other."

Likewise, the Supreme Court of Mississippi recognizes the foregoing as the rationale of the rule excluding forced confessions. In *Ammons v. State*[33] the court stated: "This sweat-box seems to be a permanent institution, invented and used to persuade gently all accused persons to voluntarily tell the truth. Whenever they do tell the truth—that is, confess guilt of the crime—they are let out of the sweat box. Speaking of this apartment, and the habit as to prisoners generally, this officer said, 'We put them in there (the sweat-box) when they don't tell me what I think they ought to.' This is refreshing.

"The confession was not competent to be received in evidence. . . . Defendant, unless demented, understood that the statement wanted was a confession, and that this only meant release from this 'black hole of Calcutta.' Such proceedings . . . obstruct, instead of advance, the proper ascertainment of truth."

The Supreme Court of New Hampshire, in *State v. Flynn,*[34] said: "The objection made in this case does not go so far as to insist that all evidence obtained under a search warrant is incompetent. . . . Its ground is, rather, that information obtained by means of a search warrant, in a case not authorized by the Constitution, is not competent to be given in evidence, because it has been obtained by compulsion from the defendant himself, in violation of that clause of the Constitution which provides that no person shall be compelled to furnish evidence against himself. . . . It seems to us an unfounded idea that the discoveries made by officers and their assistants, in the execution of

[33] 80 Miss. 592, 32 So. 9 (1902).
[34] 36 N. H. 64 (1858).

process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of a party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. . . . It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his. . . ."

The Court of Appeals of New York, in *People v. Defore*,[35] recognized the distinction between testimony gotten by use of torture of a witness, and evidence of facts learned by one who intrudes. " 'No person shall be . . . compelled in any criminal case to be a witness against himself.' New York Constitution, Art. 1, Sec. 6. This immunity, like the statutory one against unreasonable search and seizure, was considered in the Adams case, 68 N. E. 636, 176 N. Y. 351, 359. We limited it to cases where incriminatory disclosure had been extorted by the constraint of legal process directed against a witness. The Supreme Court agreed with us. Adams v. People of State of New York, 24 S. Ct. 372, 192 U. S. 585, 597, 598. Other Courts (e. g., State v. Flynn, 36 N. H. 64 etc. . . .) and learned commentators (4 Wigmore, Evidence, Sections 2263, 2264) have taken the same ground. . . ."

Therefore, the position is erroneous that evidence obtained by an illegal search is untrustworthy and should be excluded for the reasons that forbid compulsory self-incrimination. The truthfulness of evidence obtained by illegal searches is not affected at all by the fact that the search is not made under a warrant or on probable cause.

It follows that it is to be assumed, as is usual and necessary, that, for the purpose of passing on the admissibility of evidence, the evidence offered is to be taken provisionally as true, and that its admissibility or the want of it is to be determined by the rules of revelency and of extrinsic policy. At a later stage, when the case is in the hands of the jury, the truth or want of truth of the evidence

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[35]242 N. Y. 13, 150 N. E. 585 (1926).

will be passed on finally as bearing on the guilt of the accused; and if found to be untrue, the accused will then be released.

Hence, the question arises, "Is the proof of a crime which has been gotten by illegal search by an officer inadmissible because of some rule of extrinsic policy recognized by the law of the land?"

It is asserted that Section twenty-three of the Constitution of the State of Mississippi forbids the use in trials of evidence obtained by illegal search by an officer.

This is error.

THE SILENCE OF THE CONSTITUTION

No words in Section twenty-three of the Constitution of Mississippi expressly forbid the use of such evidence. The section only provides, "The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search."

The common-law is in force in Mississippi. By the common-law, proof of crime was admissible, although obtained by an illegal search. If the Constitution of Mississippi had been intended to repeal the common-law rule, it would have been written so as to repeal the common-law rule expressly. Mere silence, without more, does not amount to an expression of an intention to abrogate this rule. This canon of constitutional interpretation has been expressly declared by the Supreme Court of Mississippi.

In the case of *Yazoo & M. V. Ry. Co. v. Scott,*[36] it was held that the Supreme Court derives its power from the Constitution and the common-law, and has power by common-law to award new trials on the issue of damages. The court held that this common-law rule giving it such power was not abrogated by implication from a statute enumerating grounds for new trials, but not mentioning the court's power to grant new trials on the issue of damages. The text of the court's opinion on that point was as follows: "Should the courts hold that when any rule or principle of the common-law is by the legislature partially incorporated into a statute, the remainder of the rule is thereby repealed or annulled, endless trouble or confusion would result, necessitating in all cases a complete codification of the subject dealt with by the statute."

It follows that a partial codification of the common-law right to undisturbed enjoyment of property, leaving intact the direct remedy of the common-law for infringements of this right, did not repeal

[36] 108 Miss. 879, 896, 67 So. 492, 497 (1915). See also Hollman v. Bennett, 44 Miss. 322, at 326 (1870).

the common-law rule permitting the use of evidence gained by unlawful search.

On a similar problem of interpretation it was held in *Servis v. Beatty,*[37] a Mississippi decision, that the Constitution is to be interpreted as in accord with the common-law unless the contrary is expressly provided. "The Constitution in the Fourth Article vests the judicial power in the several courts therein provided for, and in very general terms prescribes the jurisdiction of each; . . . what those subjects were, it is evident, could only be ascertained by consulting the systems of jurisprudence existing elsewhere. Those systems were present to the mind of the convention when it undertook to provide for the organization of the courts, and to prescribe the powers which they should respectively exercise." In these and numerous other cases it is established that the common-law obtains in this state until it is abrogated by positive enactments.[38]

THE IMPLICATIONS OF THE CONSTITUTION, ANALYTIC AND PRACTICAL

The Constitution of Mississippi does not require the exclusion of evidence of crime, obtained by an officer of the state by an illegal search, by necessary implication or by reasonable implication from Section twenty-three.

A perfect right consists of the substantive right, and of the remedy for its enforcement. A perfect right to undisturbed enjoyment of property existed before the court enacted the new rule. It was established by the precept of Section twenty-three of the Constitution of Mississippi, setting up the immunity from unreasonable search and seizure, and by the judicial enforcement of the direct remedy of the common-law against the trespasser for its infringement. This direct remedy for violation of the right to undisturbed enjoyment of property existed at common law.[39] The same direct remedy against trespassers, officers or private citizens, exists today in Mississippi.[40]

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[37]32 Miss. 52, at 84 (1856).

[38]Western Union Telegraph Co. v. Goodman, 166 Miss. 782, 146 So. 128 (1933); Hollman v. Bennett, 44 Miss. 322 (1870); Hemingway v. Scales, 42 Miss. 1 (1868); State v. Speaks, 144 Miss. 125, 109 So. 129 (1926), "If the Constitution is silent on a subject of legislation, the legislature is supreme." St. Louis & S. F. Ry. Co. v. Benton, 132 Miss. 325, 96 So. 689 (1923); Miller v. State, 130 Miss. 564, 94 So. 706 (1923), "This court will not declare a legislative act void unless it appears to us beyond a reasonable doubt that it conflicts with the Constitution." See also Miss. Dig., § 48, "Constitutional Law," for an extensive collection of cases to the same effect.

[39]Entick v. Carrington, 2 Wils. K. B. 275, 95 Eng. Rep. 807 (1765).

[40]Sellers v. Lofton, 149 Miss. 849, 116 So. 104 (1928).

Since a perfect right is thus established by the constitutional recognition of the right to undisturbed possession of property, and by the common-law remedy for trespasses, it is impossible to say that an additional remedy is given by necessary implication to protect the property right. The established remedy is enough. It is not necessary to give an additional advantage and remedy for an infringement of the right to property. The necessity simply does not exist. Especially is this seen to be true when it appears that the new advantage and remedy gives a peculiar benefit to the criminal alone by suppressing proof of his crime in order to protect him from trespasses on property rights. The law abiding citizen does not have evidences and traces of murder, incest, etc., on his premises, and so never has occasion to invoke the new remedy. The criminal has no claim to any additional remedies or advantages. No additional sanction is necessary to give a perfect and complete immunity from unlawful searches or seizures. Therefore, the rejection of real and testimonial evidence under the new rule is not a necessary implication of Section twenty-three of the Constitution.

A reasonable and natural construction of Section twenty-three of the Constitution of Mississippi does not require the suppression of proof of crime merely because the proof was gotten by a trespass on property by an officer. It is not reasonable to think that the common-law rule was repealed by implication contrary to established rules of constitutional and statutory construction; that an unnecessary remedy would be provided which benefits only the criminal and which is of no use to the law-abiding citizen; and that a unique property right and privilege would be given to the criminal enabling him to demand, as a matter of right, the suppression of the proof of the most terrible crime and the restoration of the status that obtained before his property was trespassed on and his criminality discovered. The criminal has all the remedies that the law-abiding citizen has. No special privileges should be given to him.

This is true as a matter of legislative policy, and it is all the more true that special privileges should not be extended to criminals in construing a section of the Constitution which is silent on the subject of giving special privileges to criminals. This impolicy is fatal to that construction which abrogates the established law in disregard of the settled rules of construction and which threatens the safety of the state.

Finally, it is unreasonable and unnatural to think that the Constitution of Mississippi by implication runs athwart the avowed pur-

pose of all government and of all law, which is to award to each one his due—to the murderer, the punishment for murder; to the petty trespasser, the penalty for petty trespass.

FEDERAL DECISIONS DISTINGUISHED

The Federal cases which exclude evidence gotten by officers in illegal searches are based on the Fourth Amendment to the Federal Constitution. The Fourth Amendment to the Federal Constitution does not apply to state governments.[41] Therefore, the Federal decisions are not binding on the states.

Recognizing this patent fact, thirty-one states have refused to adopt the Federal rule.

The leading Federal cases concerned the right to restitution of specific property before trial.[42] But the Mississippi rule is purely a rule of evidence. The leading Mississippi cases, the Tucker and Owens cases, did not involve restitution of property. The evidence taken by the officers was intoxicating liquor, and was not the subject of ownership under the state law. Hence, the facts of the state and Federal decisions present this marked difference. The later Federal decisions recognized that there is some sort of property right in the information derived from property that has been seized, although the property seized has been returned, and so such property right is said to be protected by the Fourth Amendment.[43]

As a matter of Constitutional construction, the Federal cases recognizing this unique property right of the criminal in knowledge gained by officers by inspecting real evidence of crime on the premises of the criminal are not binding authorities, as is shown above, since the Fourth Amendment does not apply to states; and these Federal cases are not even persuasive authorities on the existence or non-existence of the common-law rule in Mississippi under the present Constitution. For, in Mississippi the common-law rules are in force unless abrogated by positive legislation. There is no express repeal of the common-law rule, and there is no repeal of it by necessary or reasonable implication from the Constitution. Hence, the common-law rule still obtains in Mississippi, even though the Federal government is not a government with common-law powers as the fabric and foundation of its system. The state has common-law powers and rules of law until it is taken away by a positive act; the Federal

[41] People v. Defore, 242 N. Y. 413, 150 N. E. 585 (1926).
[42] Weeks v. U. S., 232 U. S. 383, 58 L. ed. 652 (1913).
[43] Silverthorne Lbr. Co. v. U. S., 251 U. S. 385, 64 L. ed. 319 (1920); Agnello v. U. S., 269 U. S. 20, 70 L. ed. 145 (1925).

powers and rules arise only by positive grant. This makes a striking difference in interpretation of the Fourth Amendment of the Federal Constitution and in interpreting Section twenty-three of the Constitution of Mississippi. The silence of the state Constitution means the common-law is still in force. The silence of the Federal Constitution may, with greater show of reason, be taken to mean that the common-law rule empowering courts to admit evidence got by illegal search was not in force, and that no such power was intended. It is not my purpose to discuss the true interpretation of the Fourth Amendment. It is possible, however, that this amendment was only meant to confer immunity from search or seizure with the incidents and remedies as existed at common law. The Federal court did not take this view. The Federal decisions do not compel belief that in a common-law state the silence of the state constitution repeals a common-law rule; and so it seems that these Federal cases are not persuasive authorities on this question of local law.[44]

UNIFORM LEGISLATION SHOULD BE ENACTED BY THE LEGISLATURE, NOT BY THE COURT

The court advanced, as a reason for the new rule, the policy of having uniform state and Federal rules of evidence.[45]

The opinion of the court as to the policy or impolicy of enacting uniform Federal and state laws is not a valid reason for a decision which adopts a Federal rule.

Rules of evidence are proper subjects for legislative action. In *Carothers v. Hurley,*[46] the court said, "We do not question the competency of the legislature to change the rule of evidence, and to establish a new rule. . . ."

It is not proper for the court to invade the legislative field.[47]

The legislature enacted statutes making evidence obtained by illegal search admissible, attempting to re-establish the common-law rule.[48] The court struck down these two statutes, the one concerning evidence of gambling,[49] the other, of illicit sale of intoxicants.[50]

It is evident the legislature, which is the constituted authority to weigh policies and to enact laws, did not take the same view that

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44Cooley, Constitutional Limitations (8th ed.) 69.
45Tucker v. State, 128 Miss. 211, 223, 90 So. 845, 848 (1922).
4641 Miss. 71, 72 (1866).
47Miss. State Tax. Comm. v. Flora Drug Co., 148 So. 373 (1933).
48Miss. Laws 1924, c. 244, § 3; Miss. Code Ann. 1930, § 1235.
49Polk v. State, 167 Miss. 506, 142 So. 480 (1932).
50Orick v. State, 140 Miss. 184, 105 So. 465 (1925).

the court did regarding the policy of copying the Federal rule of evidence. Since the legislature disagreed with the court on a question of policy, and since the legislature has the authority to make laws and the court has no such authority, we would expect the court to respect the constitutional powers of the legislature.

But we are informed that the court thinks it is the better policy to copy the Federal rule, and so the court follows the Federal rule, and strikes down the statutes of the State of Mississippi.

It is submitted that the court's opinion on a question of policy is not a valid reason or basis for the decision of the court overturning our state statutes.

III.

THE POLICY OF ADDING TO THE SECURITY OF THE HOME

Again, it is alleged that the new rule is a better rule because the security of the home is made greater by it.

The law-abiding citizen never needs to object to the introduction into evidence of murderer's weapons, burglar's tools, whiskey distilleries, or of prostitution or incest. Such evidence will not be found in his home. Hence the new rule is not a benefit to the law-abiding citizen in any direct way. His only remedy is the direct remedy against the trespasser.

The new rule gives greater immunity from detection and punishment to the criminal. The "homes" of harlots, panders, cut-throats, and murderers are truly made more secure by the new rule. Therefore, the new rule endangers all homes, all property, and all life. The new rule is not a benefit to organized society in any indirect way. The new rule enhances the security of the homes and haunts of organized vice. The racketeers doubtless favor it as being most beneficent.

It is submitted that the policy of giving special privileges to the criminal bands of America is for the legislature to pass upon. The legislature, not the court, has the authority to confer special privileges on the criminals. Besides, in a representative government, law-making should be placed in the department of government that is responsive to the will of the people. If the issue is ever before the people, there will be no doubt as to whether the people of the state will give special favors to criminals.

This argument from the viewpoint of policy is not a proper basis for the decision of the case.

IV.
THE FEDERAL CONCEPTION OF HONOR IN DEALING WITH THIEVES

It is argued that the new rule is a rule of honor. Our own court advances this as a reason for adopting the Federal rule.[51] It is supposed that the state, under the common-law rule, is implicated in, or ratifies, the trespass of the officer who gets evidence of crime by an illegal search.

The Federal judges made more articulate the argument from the viewpoint of so-called honor. I quote their views as giving their side of the case:

Brandeis, J.: "If this court should permit the government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the government itself would become a lawbreaker. Will this court, by sustaining the judgment below, sanction such conduct on the part of the executive? . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . to declare that the government may commit crimes in order to secure the conviction of a private criminal . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."[52]

Holmes, J.: "If it pays its officers for having got evidence by crime, I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."[52]

Inasmuch as Mr. Holmes announced that "The object of law is not to punish sins, but is to prevent certain external results,"[53] and that a page of history is worth a volume of logic, and that we should not be imposed upon by swollen and encysted phrases as substitutes for an accurate examination of legal relations; we pause to wonder why Mr. Holmes did not have regard for practical or external re-

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[51]Owens v. State, 133 Miss. 753, at 772, 98 So. 233, at 234 (1923).
[52]Olmstead v. U. S., 277 U. S. 438, 72 L. ed. 944 (1927).
[53]Commonwealth v. Kennedy, 170 Mass. 18, at 20, 48 N. E. 770 (1897).

sults; why he did not follow the historic rule, established and followed by generations of disinterested and subtle minds, in determining the scope of the immunity from unwarranted searches and the remedy for its infringement; or why he offers a sonorous phrase, "pay for the fruits," as a substitute for a discriminating statement of the facts. The fact is the government pays no one to break the law. The assumption begs the question. Epigrammatic novelty is of less help in the problem than a sane and complete statement of the factors in the case, and a judgment in accord with the established principles of legal analysis.

The simple question involved is: Is the trespass of an officer of the state in entering unlawfully the scene of a crime imputable to the state? Is the act of the officer the act of the state, and is it the state that violated the law of the state by such trespass? Does the use of the evidence of crime gotten by an officer's trespass present all the elements of a ratification of the trespass by the state? Does the state knowingly accept the fruits of a trespass that the officer committed, with the announcement that it will in future pay for the fruits of similar trespasses? Does the state become a law-breaker, and thereby invite, by example, every man to become a law unto himself?

This is the issue involved in the argument from honor, so-called.

The actual position taken by Messrs. Holmes and Brandeis is in effect this: (1) No importance attaches to the state's prohibition against violation of law by officers, and to the state's punishment of the officers who violated the law. The act of the disobedient officer is imputed to the state despite the fact that the state enacts and enforces the law which the officer violated. Although the officer exceeds the limits of his authority as declared by the law of the land; although the state discountenances and disavows his acts, and publicly punishes him for his unauthorized act; nevertheless, the state is taken to have acted in, through, and by the officer, and the officer's act is imputed to the state. (2) The criminal has an absolute right to his property and to any knowledge another may gain of the commission of a crime by inspecting the property, the tools, and/or the evidences of crime. This property right of the criminal requires that the officer suppress the truth he learned by unlawfully looking at the evidence of the crime; and because the state permits the officer to speak the truth, in which the criminal has a vested property right, the state, therefore, violates the property right, is a law-breaker,

invites every man to become a law unto himself, and is thoroughly dishonorable.

I maintain: (1) That the wrong of the disobedient officer is not imputable to the state; and (2) that the sovereign state is by honor, as well as by the law of the land, under a duty to uphold the sanctions that protect life, as well as those which protect property; and that the state should punish the murderer for murder, and the petty trespasser for whatever trespass he may have committed.

The state has, in the instant case, two functions to perform, two sets of vital interests to guard. The first is the duty to afford sanctions for human life, and to punish crimes against life; the second, to guard property, and to punish trespasses against property. The performance of both these functions or obligations which rest on the state is essential to the preservation of the integrity of character of the state as the defender of life and the guardian of public security. For the state to discharge both these duties or obligations and to accord to each one his due will result in a balance and harmony in the system of our laws, giving scope for the enjoyment of rights in property, and also giving greater security in the enjoyment of the right to live. Let each one be accorded his due. Do not grant impunity to murder in order to give a unique and inviolable right of property to a criminal who would shield his crime against human life by invoking the claim to suppress evidence of crime, and even the knowledge gotten of crime by an unlawful looking at the chattels used as instruments of crime. The new rule protects property rights with a vengeance. It does so by sacrificing the sanctions which protect human life, whenever the criminal property right is invoked.

In regard to the issues thus stated, viz., in reference to the supposed imputation of the trespass to the state; and, secondly, in reference to the supposed ratification by the state, by admitting the evidence; it is proposed to make answer. However, in answering the argument from honor, it is not conceded that, properly considered, the question is relevant in a common-law state in which the silence of the Constitution is the sole evidence of a departure from the common-law rule by that department of the government authorized to weigh policy and enact new law. The common law admitted such evidence, obtained by unlawful search. Mississippi is a common-law state. The Constitution made no express change. The Constitution made no change by reasonable implication. The legislature passed statutes restoring the common-law rule after the court repealed it; but the court erroneously enacted the new rule, overruled the act

of the law-making department, and affirmed its own new rule of law. The issue properly is an issue of law. The fact that Mississippi is a common-law state, and that the common law admitted the evidence, although gotten unlawfully, should dispose of the case. The refined and fantastic conceptions of honor have no place in the decision of the matter by a court of law. However, it can be shown that, by the rules of honor, the new rule is vicious and uncalled for. We will proceed to show this.

1. Mr. Holmes says that the state knowingly pays for the fruits of the trespass of the officer.

It should be unnecessary to say that this statement is not true. The state does not pay an officer to break the law. The state pays him to enforce the law. The state requires him to swear to keep the law. The state imposes the law on him as well as on every one else. The state inflicts penalties on him if he violates the law. Therefore, there can be no imputation for the reason assigned by Mr. Holmes.

The connection that is supposed to exist between the state and its trespassing officer is shown not to exist by the rule of the common law that the trespassing officer is liable to punishment by the state. The rule of the common law vindicates the honor of the state and prevents the imputation of the trespass to the state. The act of trespassing cannot be attributed to a state that punishes the trespass.

Punishment reveals what the punisher is opposed to; what he will not tolerate. Beelzebub does not cast out devils in the name of Beelzebub. A fountain does not bring forth at the same time bitter waters and sweet. By revealing his character, in punishing the wrong, the sovereign vindicates his character. Punishment shows that the character of the sovereign is faithful to the high ends which he serves. In the ultimate sense of the word, "to vindicate" means to assert the desire and design (vin-dicare), or the power and authority of the ruler as the protector of life and its essential conditions (vim-dicare), and as the punisher of all things destructive of life.[54]

From the fact that the sovereign forbids crime and punishes sin, it follows that the sovereign, be he human or divine, is not guilty of the crimes or sins of his agents.

The relation of the deity, as Creator and Sustainer of life, is closer to the free agents whom he permits to violate his law than is the relation of the state to its trespassing agents. If retributive justice vindicates the character of God, then *a fortiori* the state vindicates

[54]VIII Century Dictionary (1899) 6757.

its honor by punishing the agents whom the state was powerless to prevent from trespassing.

The sovereign is not guilty of the crimes of his agents. He does not consent to the wrong beforehand, but forbids it. He does not treat it as a thing indifferent afterwards, but punishes it. These things set the sovereign in complete opposition to the wrongs of the agent and sever any possible complicity in the wrong. The wrong is the wrong of the agent alone, in opposition to the will of the sovereign. In this light the sovereign vindicates its honor by punishing the trespassing officer who discovers a crime, reveals its antagonism to trespass, and prevents any reasonable person from attributing to the state the intention and the overt act of trespassing.

2. The good faith and sincerity of the state are not impeached by the use of the evidence in the trial of the criminal.

The error of the Federal ratification argument consists in omitting from the analysis the necessary and paramount function of the state as the sovereign and the ruler, and in sacrificing this vital function by an over-simplification which assimilates the state to a private person without governmental functions and powers. The absurd result that is reached betrays the error in the reasoning. The state shuts its eyes to murder, and is outraged by the theft of a shot-gun shell. The state strains out a gnat, and swallows a camel.

The distinction between cases in public law and cases in private law is of capital importance in the present problem. In public law the sovereign is one of the parties, and has functions and powers which no private person can exercise. As the sovereign ruler the state cannot permit one interest or claim to defeat other established rights, or to defeat the chief purpose of the state.

Accordingly, when it is remembered that the criminal is asserting a unique property right against the sovereign ruler in order to subvert the rules and laws of the sovereign, he is met by a stern, necessary, and just denial of such right. He is met by the principle that one who abuses the property rights given under the law in order to destroy all law and all government, loses his property right, and is also liable to punishment in his person. The criminal uses his claim to an inviolable property right to conceal flagrant violation of the law. The state cannot permit a property right to be absolute and to be used to destroy the law. Moreover, the right to life is more sacred than the right to property. Property is only a means to better living, the product of labor, an adjunct to life. Hence, a higher right inheres in the state, as the preserver of society, to enforce the sanctions of life,

and to override the spurious claim to an unconditional right to chattels which have been used to commit or conceal the crimes against human life.

As a matter of good morals, the greater obligation should be discharged, and should not yield to the lesser obligation. However, if the rule of the common-law is followed, the state discharges both sets of obligations. Property rights are not permitted to paralyze the enforcement of the criminal law. At the same time, a reasonable orbit is left for the enjoyment of property rights, and a sanction is afforded for *every* infringement of such right. Non-criminal uses of property are freely permitted under the common-law rule. A trespass by an officer is punished, even though the officer is one who discovers a crime. However, no immunity is given the property owner for his criminal use of his property, and the liability of the criminal property owner to punishment is essential if the sanctions of life are to be preserved. So, under the common-law, a balanced and a harmonious system resulted; and reason, justice, good morals, and honor were satisfied by the rule. The effect of the common law rule was to recognize the limitation placed on property rights by the necessities of the enforcement of the criminal law. This same principle is recognized in other branches of the law, as by the rule permitting no one to assert property rights in intoxicants, contraband, and the like. In the right to assert *ius tertii* in replevin, the law permits a higher claim to be asserted which changes the result that otherwise would obtain as between the immediate parties, likewise, in the enforcement of the criminal law, the state, as the representative of society, should assert the higher right of the innumerable third persons called "society" and should punish the criminal caught red-handed, for the good of public order and peace.

By "honor" is meant conformity of character to the highest ethics, in thought, feeling, and action. Hence, by the standard of honor, the tremendous responsibility of preserving life which rests on the state must be discharged if the state is to conform to the highest ethics. The highest honor of the state is to perform its highest duties faithfully. Any dereliction in its highest duty is a stain on the honor of the state.

The new rule, in its necessary operation, which is illustrated in the Cofer case, places the state in the light of a sovereign who, by the law of the land, permits murder to be committed with impunity and complete success, and who, by law, does not fulfill the obligation to protect the lives of the citizens. If there is any honor,

such a state is recreant to the highest and most sacred duties, and is dishonored by her shameless connivance at the most loathsome of crimes. Thus the argument from honor is retorted on the proponents of special privileges for criminals at the expense of the lives and liberties of law abiding men. It is they who dishonor the state, and it is their rule which stains the state with the deepest infamy. The price of special favors to criminals is recreancy to the chief duty of the state, to accord to each one his due, to enforce the law, protect life, and keep the peace.

The significance of the state's shutting its eyes to the proof of murder and stopping its ears to the demands of retributive justice cannot be ignored. This shameless connivance at murder signifies that the state is of such a character as to tolerate murder and to prefer a criminal claim to property over life itself. In the Cofer case cartridges, as property of assassins, were of greater weight in the scales of justice, so-called, than the life of a human being whose murder was unpunished. Such a state has lost its most vital principle. Such a state will not punish a murder. Such a state does not administer justice.

Such conduct debases the character of the state, and makes her the janitor and door-keeper of the haunts of murderers, rather than the protector of life and the source of true justice. Such a state is the patron saint of the criminal. No longer the guardian angel of life, she becomes the consort and defender of the thieves and murderers. By her law, thou shalt not punish a murderer if he invokes his benefit of property. His neck-verse is, "My property, may it ever be right; but right or wrong, my property." Bearing this charm, the murderer is the Lord's annointed. It is sacrilege to punish a murderer who flaunts his bloody property in the face of offended Justice. The murderer's dive is sacred soil, and the state must respect it at the expense of all else, even at the expense of the character of the state as the custodian of the laws sanctioning human life. The government must not play an ignoble part.

It is of course clear that the gentlemen of the United States Supreme Court have a unique insight into the charms worked by property, an insight which can be gained only by the eye of faith and the heart of mystics. It is equally clear that the impunity extended to the murderer violates the essential principle of retributive justice, and robs the state of its only title to honor.

"We are confirmed in this conclusion when we reflect how far reaching in its effect upon society the new consequences would be.

The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed and the murderer goes free. . . . There has been no blinking the consequences. The criminal is to go free because the constable has blundered. . . . We may not subject society to these dangers until the legislature has spoken with a clearer voice."[55]

CONCLUSION

A reasonable and direct remedy exists for trespasses by illegal search or seizure.[56] Damages for mental suffering caused by opening a suit-case illegally will be allowed, and the officers and their bondsmen are liable. This remedy, which existed at common law, sanctions the Constitutional right to undisturbed possession of property. No additional remedy or advantage is implied in Section twenty-three of the Constitution of Mississippi, for a perfect right exists already.

Reasonable protection should be given the homes and possessions of our citizens. Reasonable protection is given without the new rule.

Nothing is said against the rules excluding forced confessions. The victims of torture will often tell whatever is required to release themselves from torture, and such confessions are untrustworthy. Facts learned through unwarranted searches are not affected by the absence of a search warrant. These things are entirely distinct.

The new rule is out of harmony with the traditions, customs, and laws of the English speaking world; is inconsistent with justice; and is not justified by technical reasoning or common sense. Its extravagant and unreasonable nature reveals itself in its necessary operation in extending special favors and advantages to the organized criminals of America who attack and prey upon the property, liberty, and lives of our citizens, in open warfare.

The confusion and the complications of the new rule are formidable. The impractical nature of the rule can find no better demonstration than in the result it effected in the Cofer case. The

[55] Justice Cardoza in People v. Defore, 242 N. Y. 413, 150 N. E. 585 (1926).

[56] Sellers v. Lofton, 149 Miss. 849, 116 So. 104 (1928); United States F. & G. Co. v. State, 121 Miss. 369, 83 So. 610 (1920).

long line of cases in this state which follow the new rule is but a continuous series of miscarriages of justice. The shocking spectacle of criminals caught red-handed making good their escape by invoking a property right in a chattel, and the ineffectiveness of law enforcement agencies due in part to this rule prove conclusively that the rule is based on injustice and dishonor. Where crime flourishes, and the law is paralyzed by a rule of law, something is radically wrong. The erroneous reasoning of the Federal court is at the bottom of the trouble. The result of the Federal rule giving special privileges to criminals as a matter of justice reminds us of the description the poet gives of the government of Hades, where

"Chaos umpire sits,
And by decisions more embroils the fray
By which he reigns."

A REVIEW OF YAZOO & MISSISSIPPI VALLEY RY. CO. V. WALLACE

WM. HEMINGWAY* AND JAMES J. LENOIR**

The case of *Yazoo & Mississippi Valley Ry. Co. v. Wallace*[1] presents an interesting discussion and interpretation of the subject of damages. The question involved is the amount of damages which should be awarded to an individual who has suffered serious injury through the negligence of a railroad company. The case came up twice before the Supreme Court of Mississippi, and in order to understand the second decision it might be well to discuss the circumstances under which the case was first brought before the court.[2]

According to the facts, the plaintiff was twenty-six years old, "an unusually strong and healthy young man, six feet two inches in height," and had been employed by the Yazoo & Mississippi Valley Ry. Co. as a brakeman. At the time of the accident he was discharging his duties, riding on the pilot of a work train. The engine was approaching a "recently repaired railroad crossing" when the brakeman, in order to give a signal to the fireman, who was temporarily acting as engineer, undertook to cross from one side of the pilot to another, "by stepping upon a small and narrow stepping board on its side." While the brakeman was standing on the stepping board, the engine reached the repaired crossing. Then, because of improper repairing, which had been done at least thirty days before, the brakeman's foot was caught between the pilot and the road bed, so that "he was thrown under the engine and lost both legs." Of course, he suffered intense pain. In the trial before the circuit court there was introduced no evidence of wilful wrong on the part of the defendant's agents or employees. The plaintiff's declaration did not claim punitive damages, but charged negligence of the master in failing to furnish a safe roadbed and safe machinery. The jury below awarded the plaintiff $50,000.

The defendant company contested the award by entering a motion for a new trial, but the circuit court overruled the motion. In so doing, it made this statement: "The verdict was large, and doubtless too large to stand; but, under Section 4910 of the Code of 1906,

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[1] 91 Miss. 472, 45 So. 857 (1908).

[2] Yazoo & Mississippi Valley Ry. Co. v. Wallace, 90 Miss. 93, 43 So. 469 (1907).

it (the court) had no power to interfere with the amount of the verdict."[3] However, the trial court, in most jurisdictions, under certain circumstances may grant the motion for a new trial if it appears that there has been an award of excessive damages, or where it is clear that the defendant has not obtained justice as well as the plaintiff.[4] The trial judge, in his ruling, did not distinguish between "excessive damages" and damages which were doubtless too large to stand, but he followed Section 4910 of the Code, undoubtedly thinking the court did not have the power to grant the motion for a new trial.

The defendant then appealed the case to the supreme court of the state. The opinion of the court was handed down by Judge Calhoun. There was a brief concurring opinion by Chief Justice Whitfield. Judge Calhoun examined critically Section 4910 of the Code of 1906, which he quoted as follows: "The circuit court shall not *in any case* have the authority to cause the plaintiff to enter a remittitur on pain of suffering a new trial, but if there is *no other error* committed during the trial of any such cause *except* that the verdict is, in the opinion of the court, excessive, the court shall overrule the *defendant's motion* for a new trial. But the Supreme Court may, *where it thinks* the verdict of the jury excessive, reverse the case unless the *appellee* will enter a remittitur in such sum as the Supreme Court shall direct."[5] He held that the act was plainly unconstitutional and void for a number of reasons: (1) It was for the benefit of the defendant; (2) the defendants were shut out from having a complete and final disposition of their rights in a forum provided by "the organic law for all"; (3) it compelled the plaintiffs to appeal, which otherwise they might not wish to do; (4) it attempted to give the supreme court original, "instead of mere appellate" jurisdiction; and (5) it would probably be void as in conflict

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[3]Quoted by the court, 90 Miss. 93, 43 So. 469, 470.

[4] 2 SUTHERLAND, DAMAGES (Berryman, 1912) 1492, § 451, says, "If there is a legal measure of damages which the jury have deviated from, by finding either less or more than the plaintiff is entitled to by a preponderance of the evidence, the trial court, in the exercise of discretion, will entertain a motion for a new trial on behalf of the party injured by the finding. So if the jury assess damages not warranted by the declaration, the verdict will be set aside, and the court may do it *ex officio*." See, also 3 SEDGWICK, MEASURE OF DAMAGES 2267, § 1325, which says, "The court holds itself at liberty to set aside verdicts and grant new trials even in that class of cases where there is no fixed legal rule of compensation, whenever the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance. But this power is never used except in a clear case."

[5]The italics were inserted by the court.

with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

This opinion of Judge Calhoun is of added interest when one remembers that he was the President of the Mississippi Constitutional Convention of 1890, being somewhat of a "James Madison" of that convention. As supreme court judge he was therefore peculiarly fitted to pass on the constitutionality of the statutes involved in cases coming before the court. In the instant case he opposed the injustice against the defendant litigant caused by the provision of the Code and said, "Such a clause as Section 4910 would hardly have received a vote in a convention of the people to adopt a Constitution. . . . Our own Constitution provided (Section 31) that 'the right of trial by jury shall remain inviolate.' When this was adopted, 'trial by jury' meant in court under the forms of law, with a judge presiding to direct the proceedings in conformity with it. Twelve men in the woods or on a street corner were not imagined."[6] He thus concluded that the case should be reversed and remanded for a new trial because of these defects mentioned above.

Yazoo & Mississippi Valley Ry. Co. v. Wallace was tried a second time in the circuit court, and again the jury awarded $50,000 damages to the plaintiff. The defendant accordingly moved for a new trial on the ground, among others, that the award was excessive. This motion was not granted, and again the defendant appealed. This time Chief Justice Whitfield handed down the opinion of the court.[7] He thought that the award was unconscionably large though there had been "great mental and physical suffering" on the part of the plaintiff. He took into consideration the plaintiff's health; the fact "that, according to the American Table of Mortality, Wallace had a life expectancy of thirty-eight years;" and the fact that his earning capacity as a brakeman at the time of the injury was from seventy-five to ninety dollars a month.[8]

At this point it is of interest to note that counsel for the plaintiff had computed, in a number of ways, the amount of damages the

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[6] 90 Miss. 93, 43 So. 469, at 470. Chief Justice Whitfield wrote a brief concurring opinion, which was as follows: "It was not for the legislature to infringe upon the judicial power vested in the circuit court. It cannot add to, or subtract from, the sum of judicial power inherently exercisable by the circuit, chancery, or Supreme Courts. On behalf of the code commissioners who prepared the Mississippi Code of 1906, I desire to say that section 4910 here involved, and section 4911 of the Code, are nonsense written therein by legislative blundering. The commission disclaims any responsibility for their most extraordinary blunders." 43 So. 469, at 471.

[7] 91 Miss. 492, 45 So. 857 (1908).

[8] 91 Miss. 492, 496; 45 So. 857.

plaintiff should receive. In one of these computations they ascertained in the following manner the amount which would compensate him for the actual money loss sustained. They assumed that he was provided with an annuity of $1,350, then they worked out this result, to-wit: that the present value of an annuity of $1,350 would be $28,400, and that, by adding to this the $1,600 Wallace claimed to have spent on account of his injury, the resulting sum of $30,000 would be the actual present value of the money damage done him. This, they said, was on the basis of an expectancy of thirty-eight years, furnished by the American Table of Mortality. The court, however, thought that it was hardly fair to the defendant to fix Wallace's expectancy, "in his present crippled and ruined physical condition, at thirty-eight years." The court continued to refer to this point, but it did add that the defendant should be allowed damages for his physical and mental suffering. Thus it concluded that $30,000 was a reasonable award. In so doing, the court admitted that the determination of damages was in the province of the jury, and that the court was limited to determine whether the jury here was "influenced by passion, prejudice, or corruption." Nevertheless it thought the damages in this instance were excessive; that is, "so utterly out of all proportion to the damage fairly proven that the verdict must be regarded, as one influenced, as to amount, by passion and prejudice." Taking this into consideration, the court agreed to affirm the judgment if the appellee would remit down to $30,000, "otherwise, it will be reversed, and the cause remanded."[9]

There are several points on which this case might be questioned, both as to its logic, and to its interpretation of the law. First, the award of damages in this country is usually said, and generally held, to be within the province of the jury, unless the jury is unduly influenced "by passion, prejudice, or corruption."[10] Unless such undue influence can be shown, the award is allowed to stand. It is true that $50,000 was high, even though one disagrees with the village wiseacre who said that "no man is worth as much as $1,000." But the jury, according to law, awarded the $50,000, and it is generally conceded that the judge is not to reduce, except under those circumstances of undue influence, mentioned above, any more than is the village wiseacre. One may also note that this decision was handed

[9] 91 Miss. 492, 497; 45 So. 857, 858.

[10] See 8 R. C. L. 673, § 215. See, also, "Appeal and Error," 4 C. J. 869, § 2846, "A finding of value or the amount of damages is ordinarily so much a matter within the exclusive province of the jury that it will not be disturbed by the reviewing court; and this is especially true where the verdict has been affirmed by the trial court."

down in 1908, and apparently no consideration was taken of fluctuation in prices. Second, the court here plainly decided that the damages were excessive and then proceeded to determine what should be the amount of damages. If the jury was not influenced by passion or prejudice, did the court have the right to declare the damages excessive? If there was such undue influence, did the court have the right to decide what the damages should be? Some cases hold that, when there is any influence upon the jury which aroused its passion and prejudice, then the case on appeal is to be reversed and a new trial granted.[11]

This last consideration seems to be the point upon which the case is most open to criticism. Since the court found prejudice in part, it would seem that it should have reversed the case the second time. How could it uphold a decision in which there was a taint of prejudice? Yet it seems to have attributed to the passion of the jury the high figure at which the damages were placed. Ordinarily it would seem that the court would have merely reversed the decision. The determination of the court that $30,000 was the proper amount also seems to have followed a viewpoint that life expectancy was not to be taken into consideration, other than the life expectancy of the plaintiff after the accident. The writer questions whether this was the full extent of the actual damage, for surely the accident must have deprived Wallace of much future happiness that would undoubtedly have been his, had he not suffered from the negligence of the railroad company. However, since in practically all jurisdictions the whole question is one of fact and therefore left to the jury, it would appear that the court acted beyond its authority in attempting to decide what the amount of damages should be.[12]

It is apparently because of a desire to limit the additional expense and delay that courts have developed the practice of denying the defendant's motion for a new trial if the plaintiff will consent to a remittitur.[13] Yet there has been some criticism of this method be-

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[11]Schendel v. Bradford, 106 Ohio St. 387, 140 N. E. 155 (1922); Arkansas Valley Land and Cattle Co. v. Mann, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. 458 (1889). See Note (1932) 16 MINN. L. REV. 185; (1932) 10 TEXAS L. REV. 240.

[12]This seems to be the nature of the holding of the Supreme Court of the United States in Minneapolis, St. Paul & S. S. Ry. Co. v. Moquin, 283 U. S. 520, 51 Sup. Ct. 501, 75 L. ed. 1243 (1931).

[13]"The form of the remittitur is, that the verdict will be set aside and a new trial granted unless within a time limited the plaintiff files in court his remission of all the verdict except the amount named. If the plaintiff fails to file his remission within the time named, the verdict is set aside; while if the plaintiff does file his remission it is a voluntary act, and he cannot thereafter

cause of the constitutional guarantee that each party has the right to have the amount of a verdict determined by a jury.[14] In the instant case the Mississippi Supreme Court followed the rule acceptable in the majority of states that the denial of a new trial was proper even though the excessive verdict was due to the influence of passion and prejudice.[15] In this case the influence of passion and prejudice seems not to have extended to other considerations than the amount of the award. The court asserted that the jury's deliberations were impartial when the issue of liability was decided, but became affected by passion and prejudice when the amount of damages was considered.

This type of case has been justified on the ground that the court, in refusing motion for a new trial and suggesting to the parties the amount it will sustain, is not invading the powers of the jury.[16] The argument is that, when the court permits a remittitur of that portion of the judgment dealing with the amount of damages, it does not substitute its judgment for that of the jury, but merely indicates the amount that it will not pronounce excessive.[17] In other words, the alternative of a remittitur is given to avoid further litigation. It seems that the decisions of most states have been in line with this decision, the main purpose, as was explained, being to keep a litigation from bouncing back and forth between the appellate and trial courts. Certainly *Yazoo & Mississippi Valley Ry. Co. v. Wallace* furnishes an excellent case for those who support the majority rule that the appeal court has the power to grant a remittitur.

Yet there are others who criticize this decision and maintain that it cannot be justified in a country where the jury has the power to determine the amount of damages to be awarded from the evidence

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ask for judgment on the original verdict." 3 SEDGWICK, MEASURE OF DAMAGES 2680, § 1330.

[14] See Note (1932) 16 MINN. L. REV. 185.

[15] *Id.* at 190, 191, "The rule most frequently stated is that a remittitur is proper even though there has been passion and prejudice, unless the circumstances are such as to indicate, in the opinion of the court, 'a fair probability' that the jury was influenced by the same passion and prejudice in the determination of other issues. In other words, the court in certain instances may say that the jury's deliberations were impartial when the issue of liability was decided, but became affected by passion and prejudice when the amount of damages was considered." See Witney v. Kabske, 131 Minn. 261, 154 N. W. 1100 (1915); Trow v. Village of White Bear, 78 Minn. 432, 80 N. W. 1117 (1899); Taylor v. Missouri Pacific Ry. Co., 311 Mo. 604, 279 S. W. 115 (1926); Western Union Tel. Co. v. Hicks, 253 S. W. 565 (Tex. Civ. App. 1923); Southwestern Portland Cement Co. v. Graves, 208 S. W. 979 (Tex. Civ. App. 1919).

[16] See Florida E. C. Ry. v. Hayes, 67 Fla. 101, 64 So. 504 (1914).

[17] It has been held that there is not a denial of due process when a remittitur is granted. Alter v. Sherwood, 116 Ohio St. 560, 151 N. E. 667 (1926); Alabama Power Co. v. Talmadge, 207 Ala. 86, 93 So. 548 (1921).

introduced.[18] There is some ground for the argument that, when the court takes steps to determine the amount of damages it will sustain, it is encroaching on the prerogative of the jury even though there is the alternative of further litigation. Of course, it might be desirable for the courts to have this power—a Canadian writer claims that the courts in Ontario have certain powers in determining the amount of damages.[19] Yet it seems rather difficult to justify this under our system. Sedgwick, in his work on the subject of damages, says that "It has always been difficult to see how such a practice can be defended except upon consent of both parties. Except in cases where the court can discriminate the excess beyond the limit to which the jury might fairly have gone, the defendant is as much entitled to a new trial as the plaintiff upon the question of damages, and the practice really amounts to the substitution of an assessment by the court for that of the jury. On a review of the whole subject, the House of Lords has decided that without the defendant's consent it has no jurisdiction to make such an order."[20] In the present case the court left to the plaintiff the option whether he would accept the reduction or let the court reverse the case.

In this connection it is of interest to note a recent decision of the United States Supreme Court which was clearly at variance with *Yazoo & Mississippi Valley Ry. Co. v. Wallace.* This case, *Minneapolis, St. Paul & S. S. Ry. Co. v. Moquin,*[21] was begun in the Minnesota courts.[22] In an action brought under the Federal Employers' Liability Act, on appeal to the supreme court of that state, the court determined that the verdict in favor of the plaintiff was excessive because of appeal to passion and prejudice by plaintiff's counsel. It ordered a new trial unless the plaintiff should file a remittitur in the trial court. The plaintiff filed the remittitur as directed. Then, after a judgment was entered for the balance of the award, the defendant petitioned to the Supreme Court of the United States for a writ of certiorari, which petition was granted. Mr. Justice Roberts handed down the decision of the court, and in so doing took into

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[18]See (1932) 10 TEXAS L. REV. 240, 242.

[19]RIDDELL, ASSESSMENT OF DAMAGES BY THE COURT (1927), 5 CAN. BAR REV. 672 (1927) says, "The Statute of the Province of Ontario whereby, in the greater number of cases, damages are assessed by the court, was due to a great lawyer (Sir) Oliver Mowat who had the cordial and valuable assistance of a lawyer equally great (Sir) William Ralph Meredith. This law is a marvel to our neighbors to the South; . . ."

[20]SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES (2nd ed. 1909) 354-355. See Watts v. Watts (1905) A. C. 115.

[21]283 U. S. 520, 51 Sup. Ct. 501, 75 L. ed. 1243 (1931).

[22]181 Minn. 56, 231 N. W. 829 (1930); 181 Minn. 626, 231 N. W. 920 (1931).

consideration the decision of the Minnesota supreme court. He passed over as immaterial the question whether according to the "state's jurisprudence" the lower court had the right to grant the plaintiff a remittitur. His decision in the particular case was that "In an action under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." He was of the opinion that a remittitur under any circumstance may be quite as effective to beget a "wholly wrong verdict as to produce an excessive one." In reversing the judgment and remanding the case, Mr. Justice Roberts concluded with the statement that "a litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."[23]

Regardless of the above decision the general rule followed in most states is as was held by Chief Justice Whitfield in *Yazoo & Mississippi Ry. Co. v. Wallace*—that is, that the appeal court may reduce the amount awarded by the trial court as a condition of affirmance, or order a new trial.[24] Those upholding the rule justify it on the ground that theoretically the appeal court is not invading the power of the jury to make the award but, in permitting a remittitur of that portion of the jury's award of damages regarded as excessive, it does not substitute its judgment for that of the jury; it merely indicates the amount that it, as an appeal court, would not pronounce excessive. It offers a remittitur as an alternative to avoid further litigation.[25] Chief Justice Whitfield's decision was well supported by case law in other states, and the rules he followed are accepted in the majority of the states today.[26]

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[23]283 U. S. 520, 522, 51 Sup. Ct. 501, 75 L. ed. 1243, 1244.

[24]See the discussion of the various rules of interpretation in regard to the validity of the remittitur, Note (1932) 16 MINN. L. REV. 185. See, also, the cases cited, *supra* note 15.

[25]See Note (1932) 16 MINN. L. REV. 185, at 195, in which the author of the note concludes: ". . . where the jury has returned a verdict for unliquidated damages, excessive because of passion and prejudice, a new trial on all issues should be granted, unless the circumstances are such that the court would have been justified either in directing a verdict for the plaintiff or setting aside a verdict for the defendant. In the latter case, or where the only error is that the verdict is excessive as the result of some cause affecting the issue of damage alone, a new trial on the issue of damage only should be granted, unless the plaintiff consents to a remittitur large enough to reduce the verdict to the lowest amount that the court would have been willing to sustain." The author of the note further points out that a combination of a limited new trial and a remittitur is not unknown, and for reference on this point cites F. W. Woolworth Co. v. Volking, 135 Miss. 410, 100 So. 3 (1924).

[26]See (1932) TEX. L. REV. 240. See, also, Note (1932) 16 MINN. L. REV. 185.

The opinion of Mr. Justice Roberts presents, in concise terms, the very opposite rule to that stated in *Yazoo & Mississippi Valley Ry. Co. v. Wallace,* thus indicating that the Supreme Court of the United States is not in agreement with the majority of the state courts on this question. However, except in cases in which a federal question is involved, this opinion does not overrule the general holding of the Minnesota supreme court that the plaintiff should be granted the alternative of remitting or bringing a new trial.

Some critics have gone to the extreme in saying that the award of damages was really within the province of the court. But it would seem to the writer that, under our present system of jurisprudence, by which such power of deciding the amount of the award has been left to the jury, the rule announced by Mr. Justice Roberts in *Minneapolis, St. Paul & S. S. Ry. Co. v. Moquin* is the better of the two views. It would appear difficult "to comprehend by what means an appellate court may determine to what extent and in what direction the jury was influenced by prejudice and passion, if existing at all."[27] Since such is true, it would seem to be the better view that the case should be sent back to the trial court for a retrial.

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[27] (1932) 10 TEX. L. REV. 240, 242.

THE LAW OF IMPEACHMENT

GEORGE H. ETHRIDGE*

An impeachment is a legal proceeding authorized by law—usually by the Constitution—for the trial and removal of officers for the commission of offenses named in the Constitution authorizing such trial and removal. In the United States, and in most of the several states, including Mississippi, the House of Representatives has the sole power of preferring the charges against the officer, and the Senate has the sole power of trying the cause after charges are preferred. In some of the states provision is made for a trial of the charges before some other judicial body; and in some states proceedings are authorized allowing certain officers to prefer the charges for certain offenses, and the courts to try the charges so preferred. In the United States, meaning, thereby, the several states composing the Union, as distinguished from the National Government, there are two theories prevalent, some states adopting the one and some states the other. One of these theories may be called the Judicial Theory, and the other the Political Theory. Under what is termed the Judicial Theory, impeachment is governed entirely by law, and there must be due process of law—that is, there must be proceedings on notice and opportunity to be heard, with all the rights attending a regular trial. Under this theory, the offense must be defined by law, and the proceedings are governed by rules of law in all particulars. This theory proceeds upon the idea that the law defines, that reason rules, that passion is suppressed, and that justice will prevail. The other theory proceeds upon the idea that it is not necessary for the offense to be specified by law, in the constitution or in any statute specifically defining the offense for which the trial is had; but that those charging the offense, and those trying it, may convict for anything that is offensive to the ideals and ideas of the triers—that anything which, in their judgment, evidences unfitness for holding office, or any moral delinquencies, whether connected with official conduct or not, is ground for impeachment if the triers of the cause so decide. It is claimed by the advocates of this theory that the proceeding is political, and not judicial, and that they are confined to no standards other than their enlightened consciences. Under this theory, passion rules, reason is suppressed, bias and prejudice adjudge, and political victory is the goal. It proceeds upon

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the idea that "to the victor belongs the spoils," and that "the end justifies the means." I shall discuss the question of impeachment with a view to each of these theories.

First, as to the Judicial theory. It requires that the law name the offenses for which impeachment may be had, who may be impeached, and what proceedings may be taken to that end. In the constitutions of nearly all the states of the Union, as well as in the Constitution of the United States, the offenses for which officers may be impeached are named, but the terms are not specifically defined throughout. These constitutions also name the bodies that may institute impeachment, and what body or court may try them, and what the judgment, upon conviction, may be. In Mississippi it is provided that "The Governor, and all other civil officers of this State, shall be liable to impeachment for treason, bribery, or any high crime or misdemeanor in office."[1] Treason and bribery are well known terms at the common law and are also defined by statute. Treason is defined in the Constitution, and the proof required to convict is also stated. "Treason against the State shall consist only in levying war against the same or adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."[2] Bribery was defined at the common law as "the receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules and integrity."[3] "Bribery is corruptly tendering or receiving a bribe for official action."[4] "It is defined by Blackstone to be where a judge, or other person connected with the administration of justice, seeks an undue reward to influence his behavior in office."[5] It was also defined by statute in Mississippi and the definitions at common law enlarged to embrace other acts.[6] Both treason and bribery indicate corruption in office and unfaithfulness to the government and the law. What do the other words used in the constitution above quoted mean?—"Any high crime or misdemeanor in office."

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[1] MISS. CONST. (1890) § 50.
[2] MISS. CONST. (1890) § 10.
[3] BLACK, DICTIONARY OF LAW 154.
[4] Hall v. Marshall, 80 Ky. 552 (1882); Walsh v. People, 65 Ill. 65, 16 Am. Rep. 569 (1872); Commonwealth v. Murray, 135 Mass. 530 (1883); Hutchinson v. State, 36 Tex. 294 (1872).
[5] WHARTON, CRIMINAL LAW (10th ed. 1896) § 1857.
[6] MISS. CODE (1880) §§ 2727-2735 (the law in force when the Constitution of 1890 was adopted).

Under the doctrine of *noscitur a sociis,* the meaning of words is or may be known from the accompanying words.[7] In the case of *Anderson v. City of Hattiesburg,*[8] it was held that generic terms following specific terms of like nature take their meaning from the latter, and are presumed to embrace only things or persons of the kind designated by them. The words, then, "any other high crime or misdemeanor in office," used in the section naming the offenses for which impeachment may be had, mean those characters of misdemeanors at common law indicating or expressing corruption or unfaithfulness in office and to official duty. In *Ex parte Grossman,*[9] the United States Supreme Court held that, in determining the power of the President to grant pardons, the Constitution not specifically naming the matters in which pardons may be granted, that the common law would be looked to. The court, speaking through Chief Justice William H. Taft, said,[10] "The language of the Constitution can not be interpreted safely except by reference to the common law and British institutions as they were when the instrument was framed, and adopted. The statesmen and lawyers of the convention who submitted it to the ratification of the conventions of the thirteen states were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of them, but when they came to put their conclusions in the form of fundamental law, in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.[11] In *Byrd v. State,*[12] it was held that the provision of the Mississippi Constitution guaranteeing trial by jury, but not defining the term, would be determined in the light of the common law upon that subject, and that so construing the Constitution, a jury of twelve men were required. In this opinion, the court said: "Our statute nowhere defines the number necessary to constitute a jury; but the number twelve, known as the number at common law, is no doubt what is meant by the Constitution and all the statutes when a jury is mentioned. If we have thus derived the number and consider it

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[7] BROOM, LEGAL MAXIMS (3rd ed. 1864) 528; 25 MISS.-SO. DIG. "STATUTES" § 194.

[8] 131 Miss. 216, 94 So. 165 (1922).

[9] 267 U. S. 87, 45 Sup. Ct. 550, 69 L. ed. 527, 38 A. L. R. 181 (1924).

[10] 267 U. S. 87, 108, 69 L. ed. 527, 530.

[11] See also cases cited in 4 U. S. S. C. Dig. (Lawyers Co-op. 1928) 1845, § 21.

[12] 1 How. (Miss. 1834) 165.

secured by the Constitution, is it not also a fair inference that the incidents, such as the mode of selecting and the qualifications of the individual jurors should also follow as necessary to the perfect enjoyment of the privilege?"[13]

In Black's *Constitutional Law,* it is said, "A constitution should be construed with reference to, but not overruled by, the common law, especially as to words and phrases which have received a judicial construction."[14]

PROVISION IN PARI MATERIA

In determining the purpose and meaning of any constitutional provision, all other provisions *in pari materia,* or in reference to the same subject, should be taken into consideration. In considering, therefore, the meaning of the sections regarding impeachment as a method of removing officers from their offices, we should take into consideration other sections bearing on the question and providing additional, or other, methods for accomplishing the same purpose. Let us, then, look to the other sections of the Mississippi Constitution, to see for what offenses, and by what proceedings, that object may be accomplished, and to see just what was meant by the terms used in providing for impeachment proceedings. The Constitution provides.[15] "All public officers, for wilful neglect of duty or misdemeanors in office, shall be liable to presentment or indictment by a grand jury, and upon conviction shall be removed from office, and otherwise punished as may be prescribed by law." It further provides:[16] "The legislature may empower the Governor to remove and appoint officers, in any county or counties or municipal corporations, under such regulations as may be prescribed by law." Another section makes the provision that:[17] "No person shall be elected to office in this state for life or during good behavior, but the terms of all offices shall be for some specified period." By the terms of another section,[15] wilful neglect of duty is made *per se* a crime of a

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[13] 1 How. (Miss.) 165, 177.

[14] BLACK, CONSTITUTIONAL LAW 82, citing ex parte Groseman, 267 U. S. 87, 45 Sup. Ct. 550, 69 L. ed. 527, 38 A. L. R. 181 (1924); Meeks v. Johnson, 85 Fla. 248, 95 So. 670 (1923); State v. Ellis, 184 Ind. 307, 112 N. E. 98 (1916); State v. Criqui, 105 Kan. 716, 185 Pac. 1063 (1919); State v. Kearns, 304 Mo. 685, 264 S. W. 775 (1924); Costigan v. Bond, 65 Md. 122, 3 Atl. 285 (1886); State v. Prouty, 94 Vt. 359, 111 Atl. 552 (1920); Great So. Life Ins. Co. v. City of Austin, 112 Tex. 1, 243 S. W. 778 (1922); Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529, L. R. A. (1915 F) 1093 (1915); BLACK, INTERPRETATION OF LAWS 360.

[15] MISS. CONST. (1890) § 175.

[16] MISS. CONST. (1890) § 139.

[17] MISS. CONST. (1890) § 20.

high order, and for the commission of such crime by a public officer, the officer shall be removed from office. By necessary implication, this is one of the "high crimes and misdemeanors" embraced in the section[1] of the Constitution authorizing impeachment by the legislature. This section in the present constitution is broader than the similar section in the Constitution of 1869, and now embraces all public officers—a term much broader than "civil officers" used[1] in our present Constitution. Under the Constitution of 1869, it was provided,[18] "Clerks, sheriffs, and other county officers, for wilful neglect of duty, or misdemeanor in office, shall be liable to presentment or indictment by grand jury, and trial by petit jury, and upon conviction shall be removed from office." Under the present Constitution,[15] and the Constitution of 1869,[18] it has been held that in order to remove from office, there must not only be a conviction of crime in office, but that that there must also be an indictment by a grand jury and conviction by a petit jury to authorize removal; that a person, though convicted by a justice of the peace having jurisdiction of the offense and power to punish, could not be removed from office by such officer.

The Codes of the various periods covered by these sections have defined for what misdemeanors a person may be removed from office. By the Code of 1930, it is provided,[19] "If any public officer, state, district, county or municipal, shall be convicted of misconduct or misdemeanor in office, or of any felony or other infamous crime, or of corruption in office, or peculation therein, or of gambling or dealing in futures, *with money coming into his hands by virtue of his office,* the court, in addition to such other punishment as may be prescribed, shall adjudge the defendant removed from office, and the office of the defendant shall become vacant," etc. Other sections defining the duties of officers, and making their conduct under given facts misdemeanors, are contained in the chapter on Crimes and Misdemeanors.[20] Doubtless these embrace offenses for which, on conviction, in the method pointed out in the Constitution, would authorize their removal from office. So, it is not necessary to place a strained construction on Section fifty of the Constitution to get rid of criminal and unworthy officers. But the method by impeachment is not as broad as the method by indictment and trial before a petit jury in the circuit court. By Section fifty of the Constitution, the proceeding is authorized against the Governor and other civil officers

[18]Miss. Const. (1869) Art. VI, § 26.
[19]Miss. Code Ann. (1930) § 2907.
[20]Miss. Code Ann. (1930) §§ 1065-1080.

of this state. "Civil Officer" is a more restricted term than public officer. A public officer is broadly defined in our decisions. In *Alcorn v. Shelby,*[21] the following language is used: "And it is laid down 'that a public officer is one who has some duty to perform concerning the public; and he is not less a public officer when his duty is confined to narrow limits, because it is the duty which makes him a public officer and not the extent of his authority.' And we apprehend that it may be stated, as universally true, that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office, and the person who performs it is an officer.'

A civil officer is one of much more restricted definition.[22]

The favored method of removal of officers in Mississippi is by indictment and trial, for the reason that it secures every opportunity for fairness and impartiality and a judicial review by the Supreme. Court, usually away from the environments and passions incident to a trial of this character. The proceedings are limited to the causes and methods provided by the Constitution, and it has been held that the Legislature can not provide for the arbitrary removal of a public officer, *without a trial and hearing upon a charge connected with the performance, or neglect, wilfully, to perform some duty of his office.*[23] The method provided by Section 139 of the Constitution seems not to have been resorted to, or, at least, not litigated so as to get a construction of it by the courts. It, apparently, authorizes the Legislature to provide any reasonable scheme for removing county and municipal officers, and was apparently overlooked by counsel and by the court in the Meridian Police Commission cases,[24] although the method there resorted to was not in conformity, apparently, with this section.

By the Code of 1930,[25] it is provided that any officer who shall be guilty of habitual drunkenness, or who shall be drunk while in the actual discharge of the duties of his office, or when called upon to perform them, may be indicted therefor, and upon conviction shall

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[21]36 Miss. 273 (1858).

[22]See WORDS AND PHRASES (1st, 2nd, 3rd, 4th Series) defining "Civil Officers."

[23]See: State v. McDowell, 111 Miss. 586, 71 So. 867 (1916); Ware v. State, 111 Miss. 599, 71 So. 868 (1916); Miss. State Bd. Health v. Mathews, 113 Miss. 510, 74 So. 417 (1917); Thompson v. State, 91 Miss. 662, 44 So. 989, 124 Am. St. Rep. 715 (1907); Lizano v. Pass Christian, 96 Miss. 640, 50 So. 981 (1910); Moore v. State, 44 So. (La. 1907) 917; Ex parte Lehman, 60 Miss. 967 (1883).

[24]Monette v. State, 91 Miss. 662, 44 So. 989 (1907).

[25]MISS. CODE ANN. (1930) § 1074.

be removed from office. Under this section, it was held that an indictment thereunder must charge that the person was then the incumbent of a specific office, and must allege that he was drunk when in the discharge of his duties, or when called on to do so. It was held in *Stubbs v. State,*[26] that when the term of the officer expires, no further prosecution can be had and that it abates.

These cases, while not decisions in impeachment cases, show what must be the practice in impeachments. For the law cannot be one thing in one case, and another in another case, for the same offense, so far as the substance of the law is concerned, not meaning methods of procedure. In the case of *Pruitt, Constables v. State,*[27] it was held, under the above statute, that being drunk only occasionally, while not discharging duty, nor being called on to do so when drunk, did not constitute a violation of the statute.

In *State v. Henry,*[28] it was held that where the Constitution deals with a subject, its provisions cannot be enlarged or restricted by legislative enactment, in the absence of constitutional warrant for so doing; and that where the Constitution enumerates powers granted, or powers denied, it must be held to have named all the powers so dealt with, and as being, by necessary implication, the sole limit of authority or restriction.[29]

Having seen that the terms used in section fifty of the Constitution mean to fix definite specifications of causes for removal from office, and having compared the said section with the other pertinent sections bearing on the same subject matter, we may now define what is meant at common law by the terms "other high crimes and misdemeanors" used in section fifty. In *State v. Knapp,*[30] the Supreme Court of Connecticut said, "It is, therefore, my duty to say that the superior court has jurisdiction of high crimes and misdemeanors at common law; and the only question for me now to decide is, do the facts alleged in the information constitute such an offense?" "High crimes and misdemeanors" says Russell, "are such immoral and unlawful acts as are allied and equal in guilt to felony, yet, owing to some technical circumstances, do not fall within the definition of felony."[31] "The idea of felony," says Sir William Black-

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[26] 53 Miss. 437 (1876).
[27] 116 Miss. 33, 76 So. 761 (1917).
[28] 87 Miss. 125, 40 So. 152 (1906).
[29] See also: Miss.-So. Dig. "Statutes" § 194; State v. L. & N. R. R. Co., 97 Miss. 35, 53 So. 454, 51 So. 918, Ann. Cas. 1912 B, 1150 (1910); Anderson v. City of Hattiesburg, 131 Miss. 216, 94 So. 163 (1922).
[30] 6 Conn. 415, 16 Am. Dec. 68 (1827).
[31] 1 RUSSELL, CRIMES 61.

stone, "is so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. . . . If the offense in question be cognizable by the superior court, it must be nearly allied and equal in guilt to the crimes so punishable, such as murder, arson, rape, burglary, robbery, forgery, perjury, and many other atrocious crimes and felonies, not to be mentioned among Christians." In the case of *Pasuale Firmara v. Gardner,*[32] it was held that "High Crimes and Misdemeanors" are the more serious or aggravated misdemeanors, those which are nearly allied with, and equal in guilt to, felonies, but which do not fall within the definition of felonies. It would appear that any person would know that the term "High Crimes and Misdemeanors," indicates the more serious offenses of the law, and does not embrace petty misdemeanors, or those which do not seriously affect the public peace, order and welfare. But, as will hereafter be seen when we discuss the other theory—the Political Theory—many persons of high authority take the other view. In *Coco, Atty. Gen. v. Jones,*[33] it was held that under the constitution of Louisiana providing for impeachment and removal of judges and other officers for high crimes and misdemeanors, for malfeasance or misfeasance in office, etc., (the subsequent constitution omitting the words "malfeasance" and "misfeasance" and reading "for high crimes and misdemeanors in office") removal from office is not authorized unless the crimes were committed in connection with official acts. It would seem that due process of law would necessarily require that the law itself define somewhere what the offenses are, or the particular acts, that constitute the offense. It must be either in the Constitution, statute, or the common law. It can not, consistent with due process of law, exist merely in the uncontrolled will and mind of a legislator. In the case of *United States v. Cohen Grocery Co.,*[34] it was held that due process of law required that the acts defining the offense should be specific enough so that its meaning could be determined from the law itself. The court said, "Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country. Therefore, because the law is vague, indefinite, uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform the de-

[32] 86 Conn. 434, 85 Atl. 670 (1912).
[33] 154 La. 124, 97 So. 337 (1923).
[34] 255 U. S. 81, 65 L. ed. 516 (1920).

fendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer ought to be sustained." The opinion cites many cases holding that the law must define the offense. It is difficult to see how the definition of the offense could be left to senators any more than it could to courts and juries. Each senator might have a different idea of the law from his fellows, and yet he would be under no obligation to act upon their ideas rather than his own. The Constitution is binding upon the impeachment court as well as any other court.[35]

In the Constitution of Mississippi, it is provided,[36] among other things, that "Every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law." Impeachment proceedings vitally affect a person in his person and reputation. These are impaired by deprivation of his office, and the disqualifying him to hold any office of honor, trust, or profit. It is too vital a right, or liberty, to be deprived of without the cause of deprivation being defined by law, and the rights tried by due process in all of its essentials.

PROCEDURE — CONSTITUTIONAL RIGHTS

By our Constitution,[37] the House of Representatives is vested with the sole right to prefer charges in impeachment proceedings. The proceeding is criminal in its nature, and the cause of accusation and the nature of the crime must be defined with certainty, so that the accused may prepare to meet it before the Senate, have witnesses summoned in his behalf, and to have all the rights of defense allowed by law, which includes the rights to defend, in person and by attorney, to face the witnesses against him, to be heard in argument at every appropriate stage of the trial, and then to be able to plead the judgment rendered as *res adjudicata* in any subsequent trial before the Senate on the same charge. These rights are the security of every officer, and the Legislature cannot deprive the accused of them. If the charges made are authorized by law, and the Senate hears and adjudges, no court has power to review its action on appeal, or to reverse it for defects of procedure. But if the things charged do not constitute a crime for which impeachment will lie, under the law, then the Senate has no jurisdiction to adjudge, remove, or disqualify. Its jurisdiction is subject to judicial inquiry, but if the

[35]See also, R. E. Kennington Co. v. Palmer, Atty. General, 255 U. S. 100, 65 L. ed. 528 (1920).

[36]Miss. Const. (1890) § 24.

[37]Miss. Const. (1890) § 49.

charges are sufficient, no court can undo an injustice, should one be done. When the articles are adopted by the House of Representatives, that House appoints managers to prosecute the charges before the Senate, and these managers appear before the Senate and present those formal resolutions of impeachment, containing the specifications of crime with which the officer is accused. The Senate then resolves itself into a court for the purpose of the trial, and causes notices or process to be served upon the accused officer, commanding him to appear before the Bar of the Senate on a day named in the process, to answer such charges. The House of Representatives is also notified of the day for the entry upon the trial. The accused officer, on the day named, appears accompanied by his attorneys and files his answer or demurrer to the charges, or otherwise pleads thereto as he may be advised is necessary or proper. The proceeding in such cases before the United States Senate is set forth in Ethridge's *Mississippi Constitutions,*[38] and similar proceedings are used in all states where the Legislature prefers impeachment articles, and the Senate tries them. In some of the states, the courts are vested with the right of trial. In others, the judges of some of the courts sit with the Senate as advisers. The provisions of the various states differ in material respects, and each state constitution will have to be looked to in order to get the proper laws bearing upon the subject in that state. The constitutional causes for impeachment vary greatly in the different states, as will be seen from an examination of the cases dealing with that subject. When the Senate has finished the trial, so far as hearing the evidence and arguments, then it usually deliberates in secret, and each senator may give his views and argue the case from his viewpoint, and record his vote on the charges, voting on each separately, and actually disposing of the articles one at a time, if there are more than one article, as there usually are when the proceeding is before the Legislature. The presiding officer polls the senators, one at a time, usually beginning with the newer members or junior members as follows: "What say you, Senator—is the defendant guilty or not guilty of high crimes and misdemeanors as charged in article ....?" The senator votes upon his honor as a senator. If there is a conviction, then the question of the penalty is voted upon. It may be removal from office and perpetual disqualification to hold any office of honor, trust, or profit under the state of ..... or under the United States of America, as the case may be. In the impeachment of Judge Picker-

[38]ETHRIDGE, MISSISSIPPI CONSTITUTIONS (1928) 640 *et seq.*

ing in the United States Congress in the early history of the country, he was convicted and removed from office, but not disqualified from thereafter holding any office of honor, trust, or profit, under the United States Government. This question is addressed to the discretion of the Senate or other court where some other court is authorized to try the impeachment. Like the judicial officer, where the law fixes the punishment at fine or imprisonment, or both, it is up to the trier of the case to determine the penalty within the limits fixed by the Constitution. In some cases, the question has arisen as to whether an officer could be impeached for an offense after his term of office, during which term the offense was committed, has expired, but while the officer is still holding office under a new term. The states are divided upon this question.[39] The states of Georgia, Iowa, Louisiana, New Mexico, Nebraska, and New York hold that, as the object of the impeachment is to remove an unworthy officer from office, he may be impeached and removed for an offense committed while holding office under a former term, and that re-election does not condone or dispense with the impeachability. The other line of decisions seems to have been adopted in the states of Alabama, California, Florida, Texas, and Wisconsin. While Mississippi has not passed upon the question directly, it would seem, from the case of *Stubbs v. State,*[40] that this state is in line with those which hold that an officer can not be impeached for an offense committed during a former term. Of course there may be cases where it is a continuing offense, being an offense under each of the terms, in which case that doctrine would not apply. The sounder reasoning seems to be that, after the term has expired, the remedy is gone as to all offenses that are complete and not continuing. There is an anomoly in the reasoning of those states that proceed upon the idea that an officer succeeding himself has no change of terms, and that the expiration of a term does not matter if he is still in office. If an officer in one of those states commits an offense during a term of office, and his term expires and he is succeeded by another, he would not be impeachable should he thereafter be elected, because there had been an interregnum in the term. Another officer who had committed an impeachable offense at the same time, but had continued to succeed himself, would be, during the third term, subject to be impeached, and there would thus result a difference in the status of two officers who had committed the same offenses

[39]See note to State v. Hasty, Ann. Cas. 1916 B 707, and 50 L. R. A. (N. S.) 553. This case is also reported in 184 Ala. 121, 63 So. 559 (1913).

[40]53 Miss. 437 (1876).

at the same time—one would be responsible and punishable, and the other would not. In this country, we have a Democracy which is the judge of who shall serve in office, and after a term is ended, all rights to remove should cease with the term in which the offense occurred. When the statute of limitations, where there is such, has not run as to the guilty officer, he may be tried in the courts, as would an ordinary citizen. It was said by the Supreme Court of Alabama in the case of *Hasty v. State*,[41] that "While ours is a popular form of government, under which nearly all officials are elected by the people, yet public office has ever been regarded as a public trust, and our law makers, while not contemplating or requiring infallibility, have expected faithful and intelligent discharge of duty by those who are selected to fill positions of trust and responsibility. This expectation has been emphasized, not only by statutes covering nearly all derelictions of duty and providing punishment for the same, but by our organic law, which provides for the impeachment and removal from office of nearly all public officials for any of the causes therein enumerated, but which said impeachment does not exclude the right of the state to indict and is in its nature cumulative and is intended to relieve the public of an unfit official until the people have another chance to pass upon his qualifications. While this extraordinary remedy by impeachment does not prevent an indictment and conviction thereunder, and does not extend beyond removal from office and disqualification to hold office under the state during the term for which the officer was elected or appointed, it is in its nature highly penal and is governed by the law applicable to criminal prosecutions."

IMPEACHMENTS ARE CRIMINAL PROCEEDINGS

The proceedings in impeachment are criminal proceedings and are governed by the rules applicable to criminal trials.[42]

The proceedings, being criminal in their nature, demand proof that excludes every reasonable doubt except that of guilt before a conviction can be had, and after conviction or acquittal of the person he cannot be tried again for the same offense; but he may, by express Constitutional provision, be tried and punished for the crime committed before the regular courts of law. Were it not for this reservation of the power to try before the courts, after conviction

[41]184 Ala. 121, 63 So. 559 (1913).

[42]Hasty v. State, 184 Ala. 121, 63 So. 559, Ann. Cas. 1916 B 707, 50 L. R. A. (N. S.) 553 (1913); State v. Hastings, 37 Neb. 96, 55 N. W. 774 (1893); State v. Leese, 37 Neb. 92, 55 N. W. 798 (1893).

or acquittal of the crime in the impeachment proceedings, the provision against being tried twice for the same offense would apply in full force. Being criminal proceedings, will the statutes of limitation apply to bar a prosecution when the statutory period has elapsed since its commission? It would seem so. The reasons that underlie the statute of limitations apply in all their force. It is deemed best for the repose of society that there be a period when all further proceedings will cease, except the crimes excepted from the operation of the statute of repose.

The Constitution of the United States is different from the Mississippi Constitution in that the "high crimes and misdemeanors" are not expressly limited to "misdemeanors in office" in the former as they are in the latter. I think, however, that by necessary implication, the "high crimes and misdemeanors" for which a United States officer can be impeached mean that they must be such as relate to the office, and the duties and obligations thereunder imposed by law. All officers are subject to trial and punishment, except it may be that the President cannot be tried during his term. This conclusion is doubtful, although it may be that he would have to be first removed from office by impeachment before he could be tried and hindered from his duties, since the whole executive power is vested in him by the Constitution, and since he is charged with the duty of seeing that the laws are enforced, and has full control over executive officers. Some constitutional writers deem that he is exempt, while in office, from arrest and trial. If the term "high crimes and misdemeanors" in the Federal Constitution does not mean only those having relation to his official conduct and neglect of duty, then the Mississippi Constitution does, by express words, limit the crimes designated as "high crimes and misdemeanors" to official conduct and neglect of duty, or violation of laws appertaining to his office and official conduct.[43]

THE POLITICAL THEORY

The political theory is summed up in the statement of the Managers in the impeachment of President Johnson in the following words: "We define, therefore, an impeachable high crime or misdemeanor to be one, in its nature, or consequences, subversive of some fundamental or essential principle of government, or highly prejudicial

[43]See State v. Sheppard, 192 Mo. 497, 91 S. W. 480 (1905). For further discussion of the subject of impeachment generally, see 46 C. J. 1001, §§ 192-195 and 46 C. J. 1049, §§ 345, 346, 347, 352, 353.

to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, *without violating a positive* law by the abuse of discretionary powers from improper motives, or for any improper purpose. The first criticism which will strike the mind on a cursory examination of this definition is, that some of the enumerated acts are not within the common law definition of crimes. It is but common learning that in the English precedents the word 'high crimes and misdemeanors' are universally used; but any malversation in office, highly prejudicial to the public interest, or subversive of some fundamental principle of government by which the safety of a people may be in danger, is a high crime against the nation, as the term is used in parliamentary law. Hallam, in his *Constitutional History of England,* certainly deduces this doctrine from the precedents, and especially *Lord Danby's case,*[44] . . . of which he says, 'The Commons, in impeaching Lord Danby, went a great way towards establishing the principle that no minister can shelter himself behind the throne by pleading obedience to the orders of his sovereign. He is answerable for the justice, the honesty, the utility of all measures emanating from the Crown, as well as for their legality; and thus the executive administration is, or ought to be, subordinate in all great matters of policy to the superintendence and virtual control of the two Houses of Parliament.' Mr. Christian, in his notes to the Commentaries of Blackstone, explains the collocation and use of the words 'high crimes and misdemeanors' by sayin: 'When the words "high crimes and misdemeanors" are used in prosecutions by impeachment, the words "high crimes" have no definite signification, but are used merely to give greater solemnity to the charge.' A like interpretation must have been given by the framers of the Constitution, because a like definition to ours was in the mind of Mr. Madison, to whom, more than to any other we are indebted for the phraseology of our Constitution, for, in the first Congress, when discussing the power to remove an officer by the President, which is one of the very material questions before the Senate at this moment, he uses the following words: 'The danger consists mainly in this, that the President can displace from office a man whose merits require he should be continued in it. In the first place, he will be impeachable for such an act of maladministration, for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high

[44] 11 State Trials 600.

trust.' Strengthening this view, we find that within ten years afterwards impeachment was applied by the very men who framed the Constitution to the acts of public officers, which, under no common-law definition could be justly called crimes or misdemeanors, either high or low. Leaving, however, the correctness of our proposition to be sustained by the authorities we furnish, we are naturally brought to the consideration of the method of the procedure and the nature of the proceedings, in cases of impeachment, and the character and powers of the tribunal by which high crimes and misdemeanors are to be adjudged or determined. One of the important questions which meets us at the outset is: Is this proceeding a trial, as that term is understood, so far as relates to the rights and duties of a court and jury upon an indictment for crime? Is it not rather more in the nature of an inquest of office? The Constitution seems to have determined it to be the latter, because, under its provisions the right to retain and hold office is the only subject that can be finally adjudicated; all preliminary inquiry being carried on solely to determine that question and that alone. All investigations of fact are in some sense trials, but not in the sense in which the word is used by courts."

"Again, as a correlative question: Is this body, now sitting to determine the accusation of the House of Representatives against the President of the United States, the Senate of the United States, or a court?"

"I trust, Mr. President and Senators, I may be pardoned for making some suggestions upon these topics, because to us it seems these are questions not of forms, but of substance. If this body here is a Court in any manner, as contra-distinguished from the Senate, then we agree that many, if not all the analogies of the procedures of courts must obtain; that the common-law incidents of a trial in court must have place; that you may be bound in your proceedings and adjudication by the rules and precedents of the common or statute law; that the interest, bias, or preconceived opinions or affinities to the party of the judges, may be open to inquiry, and even the rules of order and precedents in courts should have effect; that the Managers of the House of Representatives must conform to those rules as they would be applicable to public or private prosecution in courts, and that the accused may claim the benefit of the rule in criminal cases, that he may only be convicted when the evidence makes the fact clear beyond reasonable doubt, instead of by a preponderance of the evidence. We claim and respectfully insist

that this Tribunal has none of the attributes of a judicial court as they are commonly received and understood. Of course, this question must be largely determined by the express provisions of the Constitution, and in it there is no word, as is well known to you, Senators, which gives the slightest coloring to the idea that this is a Court, save that, in the trial of this particular respondent, the Chief Justice of the Supreme Court must preside. But even this provision can have no determining effect upon the question, because, is not this the same Tribunal in all its powers, incidents and duties, when other civil officers are brought to its bar for trial, when the Vice-President, (not a judicial officer) must preside? Can it be contended for a moment that this is the Senate of the United States, when sitting on the trial of all other officers, and a Court only when the President is at the Bar, solely because in this case, the Constitution has designated the Chief Justice as the presiding officer? . . . . A constitutional tribunal solely, you are bound by no law, either statute or common, which may limit your constitutional prerogative. You consult no precedents save those of the law and custom of parliamentary bodies. You are a law unto yourselves, bound only by the natural principles of equity and justice, and that *salus populi suprema est lex*. Upon these principles and parliamentary law, no judges can aid you, and indeed, in late years, the judges of England in the trial of impeachment declined to speak to a question of parliamentary law, even at the request of the House of Peers, although they attended on them in their robes of office. Nearly five hundred years ago, in 1388, the House of Lords resolved, in the case of Belknap and the other Judges, 'That these matters, when brought before them, shall be discussed and adjudged by the course of Parliament, and not by the civil law, nor the common law of the land used in other inferior courts.' And that resolution, which was in contravention of the opinion of all the judges in England, and against the remonstrance of Richard the Second, remains the unquestioned law of England to this day. Another determining quality of this tribunal, distinguishing it from a court and the analogies of ordinary legal proceedings, and showing that it is a Senate only, is that there can be no right of challenge by either party to any of its members for favor, or malice, affinity or interest. This has been held from the earliest times in Parliament, even when that was the high court of judicature of the realm sitting to punish all crimes against the peace."

To the opening argument made by General Benjamin F. Butler was appended a brief of authorities relied on, prepared by William

Lawrence, M. C. of Ohio, and revised by B. F. Butler, one of the Managers. This brief begins at page 123 of The Impeachment and Trial of President Johnson, and extends to page 147, Volume One thereof, concluding with the summary first quoted above, in which many English cases of impeachment are cited and commented on. In the course of his argument, General Butler said, "Again, as political considerations are involved in this trial, raising questions of interest to the constituents of every Senator, it is his right and duty to express himself as fully and freely upon such questions as upon any other, even to express his belief in the guilt or innocence of the accused, or to say 'he will sustain him in the course he is taking,' although he says so after this impeachment had been voted upon by the House of Representatives. If the constituents of any Senator had called a public meeting to sustain the President against what they are pleased to term the tyrannical acts of Congress towards him in trying to impeach him and should call upon their Senator to attend and take part in such meeting, I do not conceive that it would, or ought to be, legally objected against him as a disqualification to sit upon the trial; and upon principles I have stated, if he should attend the meeting or favor the object." If this be the spirit of a constitutional trial affecting the highest honor of an officer and affecting his right to hold office, then, God save these United States from any future trial of that character! There were men in the United States Congress at that time who had ability in plenty to have achieved renown, and who could, had they had that moral character and courage to face their duty in a high sense of fairness and impartiality and to defy a temporary inflamed public opinion, be now sitting on the summits of Fame haloed with the purple mist of public admiration. But they are now disappearing in the shadows of oblivion. The position taken by the Managers in the Johnson trial is supported by Watson's *Constitution of the United States,*[45] and by Wrisley Brown,[46] a former assistant Attorney General of the United States, who took part in an impeachment of Judge Archbald. That theory was also entertained by Joseph Story who was judge on the Supreme Court Bench in the early days of the national life, and who wrote a treatise on the United States Constitution.[47]

Against these views, I desire to contrast the ideas and argument

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[45]pp. 1033-1038.

[46]Brown, *The Impeachment of the Federal Judiciary* (1913) 26 HARV. L. REV. 684.

[47]STORY, HISTORY OF IMPEACHMENT; see also 12 New International Encyclopedia 28; 12 Encyclopedia Brittannica 119; 12 Werner's Encyclopedia 755.

of Justice Curtis, who was also a Supreme Court Judge of the United States, but who resigned that office and was of counsel for President Johnson. Law book writers and writers of legal articles are entitled to only such weight as their views are worth, and Justice Curtis was as competent to deal with the law on this subject as either of the others mentioned. He says,[48] "In the front of this enquiry the question presents itself: What are impeachable offenses under the Constitution of the United States? Upon this question learned dissertations have been written and printed. One of them is annexed to the argument of the Honorable Manager who opened the cause of the prosecution (Mr. Butler). Another one on the other side of the question, written by the Honorable Managers themselves, may be found annexed to the proceedings of the House of Representatives upon the occasion of the first attempt to impeach the President. . . . . In my apprehension, the teachings, the requirements, the prohibitions of the Constitution of the United States prove all that is necessary to be attended to for the purpose of this trial. I propose, therefore, instead of a search through the precedents which were made in the time of the Plantagenets, the Tudors, the Stuarts, and which have been repeated since, to come nearer home and see what what provisions of the Constitution of the United States bear on this question, and whether they are not sufficient to settle it. If they are, it is quite immaterial what exists elsewhere. My first position is, that when the Constitution speaks of 'treason, bribery and other high crimes and misdemeanors,' it refers to and includes only, high criminal offenses against the United States, made so by the laws of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment. 'Treason and bribery.' Nobody will doubt that these are here designated high crimes and misdemeanors against the United States made such by its laws, which the framers of the Constitution knew must be passed in the nature of that government they were about to create, because these are offenses which strike at the existence of that government. 'Other high crimes and misdemeanors.' *Noscitur a sociis.* High crimes and misdemeanors, so high that they belong in this company with treason and bribery. This is plain on the face of the Constitution—in the very first step it takes on the subject of impeachment. 'High crimes and misdemeanors' against what law? There can be no crime, there can be no misdemeanor, without a

[48]Vol. I, p. 408.

law, written or unwritten, express or implied. There must be some law, otherwise there is no crime. My interpretation of it is that the language 'high crimes and misdemeanors' means offenses against the laws of the United States. Let us see if the Constitution has not said so. The President of the United States shall have power to grant reprieves and pardons for offenses against the laws of the United States except in cases of impeachment. 'Offenses against the United States' would include 'cases of impeachment,' and they might be pardoned by the President, if they were not excepted. Then cases of impeachment are, according to express declaration of the Constitution itself, cases against the United States. Still the Manager says that this is not a court, and that, whatever may be the character of this body, it is bound by no law. . . . According to this assumption, the same Constitution which has made a Bill of Rights of the American citizens, not only as against Congress, but as against the Legislature of every State, in the Union, that no ex post facto law shall be passed—this same Constitution has erected you into a body and empowered every one of you to say *aut inveniam aut faciam,* if I cannot find a law, I will make one. Nay, has clothed every one of you with imperial power, it has enabled you to say *sic volo sic jubeo, stat pro ratione voluntas,* I am a law unto myself, I shall govern this case. And, more than that, when each of you, before he took his place here, called on God to witness that he would administer impartial justice in this case according to the Constitution and Laws, he meant such laws as he might make as he went along. The Constitution, which has prohibited anybody from making such laws, he swore to observe, but he also swore to be governed by his own will; his own individual will was the law which he thus swore to observe and this special provision, that when the Senate sits in this capacity to try an impeachment, the Senators shall be on oath, means merely that they shall swear to follow their own individual wills. I respectfully submit this view can not consistently and properly be taken of the character of this body or of the duties and powers incumbent upon it."

Professor Dwight wrote an article[49] on the subject, but I have not been able to procure that article. He wrote in opposition to the political theory and maintained that it was governed by the law, either constitutional or the common law. In some of the states, the Constitution does not mention for what crimes an officer may be impeached, and where that is the case, the body exercising the power might rightfully look to the course of parliamentary proceedings

[49] 6 Am. L. Reg. 257.

modified by American usage, as was done in the Ferguson case,[50] where the Constitution was silent as to what offenses an officer could be impeached for. The court rejected the idea that it was law unto itself, and held that there was no arbitrary power anywhere in the American system of government, but that the courts and legislature must be governed by some kind of law. I quote from that opinion as follows: "While impeachable offenses are not defined in the Constitution, they are very clearly designated or pointed out by the term 'impeachment' which, at once, connotes the offenses to be considered and the procedure for the trial thereof. Impeachment at the time of the adoption of the Constitution, was an established and well-understood procedure in English and American parliamentary law, and it had been resorted to from time to time in the former country for perhaps 500 years. It was designed, primarily, to reach those in high places guilty of official delinquencies or maladministration. It was settled that the wrongs justifying impeachment need not be statutory offenses, or common law offenses, or even offenses against any positive law. Generally speaking, they were designated as high crimes and misdemeanors, which, in effect, meant nothing more than grave official wrongs. . . . It is said this construction of the Constitution confers arbitrary and unrestrained powers on the Senate. Not so at all. There is no such thing under our government as arbitrary power. As has often been said, it is a government of laws, and not a government of men. We most emphatically repudiate the idea that any officer may be arbitrarily impeached. In the exercise of its exalted jurisdiction, the Senate must proceed according to law. It must ascertain the law by an examination of the Constitution, legal treatises, the common law and parliamentary precedents, and therefrom determine the nature, elements and characteristics of impeachable offenses, and in the light of reason apply the principle so worked out to the facts of the case before it. . . . . This opinion should not be concluded without a statement as to the status under our organic law of the judgment of the Senate, sitting as a court of impeachment. It is unquestionably true that such judgment cannot be called in question in any tribunal whatsoever, except for lack of jurisdiction or excess of constitutional power. For instance, an attempt by the Senate to try an officer who had not been impeached by the House, or to pronounce a judgment other than that authorized by Section 3, of Article 15, would be without effect and its action void. The Senate must decide both

[50] 114 Tex. 85, 263 S. W. 888 (1924).

the law and the facts. It must determine whether or not the articles presented by the House set forth impeachable offenses, and it must determine whether or not these charges are sustained by the evidence produced. Its action with reference to these matters is undoubtedly within its constitutional power and jurisdiction. This is as it should be."

The cases cited and referred to in these decisions will give a full view of the law upon the subject in different states. Like every other question, there is a diversity of views. I will close by observing that those who sit in judgment anywhere upon the sacred rights of their fellow citizens should try to be fair and impartial, and not act upon purely personal views. The law is not the view of any single man, but the mass judgment of the majority, either crystalized in the constitution, the statutes, or the common law. Let every such person reflect that he is exercising a public function, and that justice and fairness are the essentials of all judicial proceedings and should guide us in every relation of life. Measure up to the Biblical standard, "Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift, for a gift doth blind the eye of the wise, and pervert the words of the righteous. That which is altogether just, shalt thou follow."

The finest product of our civilization is a man with a reasoning mind, stored with wisdom, with the courage to face any issue, with a righteous purpose and a love for justice.

STATE BAR SECTION

THE PROPOSED AMENDMENT OF THE CONSTITUTION OF MISSISSIPPI IN THE MANNER OF SELECTING JUDGES.

CHARLES L. GARNETT*

President Frank Everett of the State Bar Association recently asked me to prepare for the LAW JOURNAL a paper setting forth my reasons for opposing the proposed amendment to the Constitution of Mississippi in the manner of selecting judges, as submitted by the Committee on the Manner of Selecting Judges, at the Natchez meeting of the Bar Association. I now do so out of deference to his request, and not because I have time or inclination to engage in printed controversy.

The proposed amendment, as I understand it, provides:

(a) That when a Supreme Court justice is to be selected, the Secretary of the Bar Association shall submit a ballot "to each lawyer of the state"; the lawyers will by ballot indicate their choice; from the ballots cast the Secretary will make up a list of "not less than three, nor more than five names for each place to be filled," the list to contain the names of those lawyers who received the highest number of ballots; the Bar Commissioners will present this list of three or five names to the governor, and the governor, from that list, will choose the man he wants and appoint him to the Supreme Court.

(b) Circuit judges, chancellors, and county judges, will be selected from a "list of names not to exceed three," made up by the Secretary of the Bar Association, after he has submitted ballots to the members of the bar of the district or county concerned, and the ballots have been returned to him. This list will be composed of the lawyers, "not to exceed three," who received the highest number of ballots. It will be submitted to the governor by the Bar Commissioners, and the governor, from the list so submitted, will choose and appoint a circuit judge, a chancellor, or a county judge, as may be required.

It should be noted that the governor will make his choice and appointment for the Supreme Court from a list containing not less than three, nor more than five names; and his choice and appoint-

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ment for circuit judge, chancellor, and county judge, will be made from a list of names, "not to exceed three."

As I see it the proposed amendment is no more than the old appointive system we used to have, looking a bit more coquettish, and with a little more embroidery on its pantalettes.

Under the old appointive system, how did we get our judges? It should be remembered that under that system it was seldom a case of the office seeking the man. Under that system the appointment was usually made as a reward for all varieties of political hustling. I distinctly remember signing petitions to the governor for applicants for the bench, and sometimes the applicant asked the lawyers to write to the governor, or to "see" the governor, in his behalf. So when the governor made the appointment, he had before him, in the shape of petitions, letters, and interviews, a clear idea of who was the choice of a majority of the Bar. Those petitions, letters, and interviews, were, in effect, ballots indicating with much vigor and eloquence the preference of the Bar, after they had been duly solicited, coaxed, persuaded, sometimes threatened, and even approached with trading propositions, by the applicant, his managers, and friends. Rarely were there more than two or three applicants, and the Bar indicated as aforesaid their preference. The governor, of course, did as he pleased about it, and he was usually astute enough to find among the applicants some valiant trooper who had done nimble legwork and much popping-off of the mouth for him when he was a candidate, and who could be relied upon to do more when the governor made his race for the United States Senate.

Under the proposed amendment it would be mandatory upon the governor to make the appointments from the lists submitted to him; but he would be a stupid governor, unworthy of the love of the boys in the trenches, who could not find one of his valiant troopers among a list of three to five names submitted to him for a justice of the Supreme Court, or a list of not more than three names submitted to him for circuit judge, chancellor, or county judge. In fact, we have had governors who would have been smart enough to pass the magic word to their friends among the Bar, and they would have promptly concentrated their efforts on getting the name of the governor's valiant trooper on the list.

However embarrassing it may be, we might as well "come clean" and admit that we lawyers are pretty energetic political traders. We have, upon occasion, manifested as boisterous political partisanship as any other class of citizens, and we have some among us who would

not hesitate to trade off the plan of salvation and the throne of heavenly grace if by so doing they could get their snouts and feet in the feed-trough. It is sad to think we are not all pure in heart, and some of us have eagle eyes for the main chance. This is not said to hurt your feelings, but just look in the mirror and see if I have hit you. No matter how we get our judges, there will always be more or less trading in election years.

The list for Supreme Court justice would contain from three to five names; for circuit judge, chancellor, and county judge, not more than three names. The man the governor would select from the list before him, might have the smallest number of ballots, and might be very far from having a majority of the ballots. It could frequently happen that a lawyer with only a few ballots behind him, would be on the list, and the governor could choose and appoint him, "for personal reasons," although a large majority of the Bar did not favor him. Suppose the man at the top of the list, with the most ballots behind him, had never supported the governor, or had opposed him. Is anybody simple enough to suppose that that man would have even a small chance of getting the plum?

At last, disguise it as you will, it would be the governor's appointment; and the appointee, his family and friends, would feel their hearts swelling with gratitude as they contemplated a governor who was wise and good enough to extract the favored one's name from the list, and elevate him to the bench.

At the Natchez meeting the proponents of the amendment argued that it is embarrassing for a candidate for the bench to have to go about soliciting votes. I don't see that it would be less embarrassing for him to go among the Bar, and solicit their votes and influence to get his name on the list to be put before the governor. There would not be so many votes for him to solicit, it is true; but he would have to "see" every member of the Bar of the state, district, or county, as the case might be. Let us not become obsessed with the childish notion that under any system the office will be allowed to seek the man. Mississippians don't take their politics that way. There will be plenty of hustling for the bench, regardless of the method of selection.

Again, it was argued that political influences and alliances overwhelmingly obscure and outweigh merit in judicial candidates. That is sometimes, but not always, true; and the primary reason for discarding the old appointive system was that political influences and alliances too often resulted in the displacement of an able judge with

a fine record, to make place for one of the governor's valiant troopers. The members of the judiciary themselves recognized that dangerous possibility. I was told this story: When the late Senator Vardaman was in the run-off for governor, he met at a wayside station a well-known chancellor. The chancellor said:

"Jim, how is the election going?"

Jim replied:

"I am going to be elected by ten thousand majority."

To which the chancellor said:

"Tell it to me right, Jim; tell it to me right. I am in politics myself, you know; I can't afford to guess wrong."

Under the proposed amendment an aspirant with the smallest number of votes might be appointed over one with the largest number of votes because the latter "guessed wrong" in the preceding race for governor.

Much has been said about the duty of lawyers to get good men on the bench. Under the present system they have had a large hand in the election of judges; and we might as well accept full responsibility for the men on the bench. It is not unusual for voters voluntarily to consult their lawyer friends about judicial candidates; and the lawyers, while never unanimous, are ever active. If they don't elect the right man it is because some lawyers were pulling like mighty mules the other way; it is astonishing how they split up at elections; but wouldn't they split up just the same on ballots sent out by the Secretary, under the proposed amendment? Let us quit apologizing to the public. It is not every lawyer that wants to go on the bench. We have got about as good judges as we could fairly expect from the judicial material available. To err is human, and there will be an occasional misfit, no matter how we get them. Someone said that to love our fellowmen we must not expect too much of them. It is well to remember that truth, and not expect too much of lawyers when they start to balloting under any kind of system of getting judges.

It is quite the fashion for propagandists to bolster up their cause by citing what other states or other nations are doing to further the case of the propagandists. I refuse to get excited over such citations. Other states and nations have their politicians whose burning lust for office makes them stew and stink much as ours do. They want to pull us all through the same knothole; give us the herd mind. I lack the follower spirit. I read the decisions of the courts

of other states, and to some extent their law publications; they exhibit little that we need to imitate. Some have the elective system, and some the appointive system; but, either way, they are never satisfied, and indulge in croak and countercroak most of the time. As for Mississippi, we had the elective judiciary, then the appointive, then the elective again. Our own experience on both sides of the question has been sufficient to enable us to decide it. We discarded the appointive system to keep ambitious governors from making the judiciary into spokes for the political machines with which they hoped to pull themselves into the United States Senate. The reason for discarding it is sufficient; let us not go back to the trash-heap.

The cornerstone of my political philosophy is opposition to the appointive power of the governor; and in making that statement I do not refer to any particular governor, but to all governors, past, present, and future. Our governors for thirty years past have, almost without exception, been candidates for the United States Senate at the same time they were candidates for governor. With them the Executive Mansion in Jackson was only a roadhouse where they stopped to rest and refresh themselves while assembling and reorganizing their valiant troopers for the final bloody charge on Washington. Naturally when they got into office they were reaching in every direction for appointments with which to reward the faithful; nothing was too fine, too sacred, for them to grab, if they thought they could get away with it. Most of the hell I have seen in Mississippi politics the past thirty years—and I have seen plenty of it—had its origin in the appointive power of the governor. The appointive power is the foundation of the political machine; there can be no political machine without plenty of appointments for the boss. Then why be fools enough to place the judiciary, even remotely, within the governor's reach? It would be better, if we must have a change, to provide that the names on the list shall be put in a hat, and one drawn out by a blindfolded child, the one so drawn to be appointed, than to have the list placed in the hands of any governor for a choice to be made by him.

John A. Quitman was a distinguished soldier of the Mexican War, and afterwards was governor of Mississippi. He served for many years as chancellor, and was rated a fine one. He was chairman of the Judiciary Committee in the Constitutional Convention of 1832. In that convention he vigorously opposed making the judges elective, but was unsuccessful in his opposition. In 1845, in response to a letter from a friend in Louisiana, John A. Quitman said:

"As a member of the convention that revised the constitution, I used my best influence against it, or rather to confine the experiment to the selection of judges of the inferior courts by a direct vote of the people. The experience and observation of twelve years have, however, convinced me and many others who were opposed to the experiment, that our fears were not well-founded; and, so far, our system has not been attended with any of the serious evils which were apprehended. I have looked upon its operation in our state for twelve years with peculiar interest, and, from my former opposition to the measure, without any bias; and candor compels me to say that I now regard it as the best mode of selecting judicial officers."

Like General Quitman, I was opposed to the elective judiciary, and I voted against the amendment making judges elective; but after watching its operation with peculiar interest, and without bias, candor compels me to say that it is about the best way of selecting judicial officers who hold for a short term of years. I take no stock in the theory that we got abler and better men under the appointive system, but I do believe we have had more stability and certainty in judicial offices under the elective than we had under the appointive system, when a judge's hold upon his office depended, not on the record he had made there, but on his ability to "guess right" in the preceding race for governor.

Of recent years it has become apparent that both the executive and the legislative departments of government everywhere, in their ceaseless quest for power and plunder, are determined, if possible, to destroy the independence of the judiciary; they resent in loud voices any interference with their ambitious plans; they look ugly and threatening. I am for a fearless and independent judiciary, and that is possible only when the executive is made to keep "hands off." Under the proposed amendment the governor makes the final selection. I am against any augmentation of executive and legislative powers.

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NOTE AND COMMENT

MARRIAGE — MISSISSIPPI CODE ANN. (1930) § 2362 REPEALED IN PART — COHABITATION DEFINED GENERALLY — COHABITATION WITHIN MEANING OF MISSISSIPPI CODE ANN. (1930) § 2363.

Section 2363 of the Mississippi Code of 1930 provides in part that: "The failure to comply with the provisions of this section shall not affect the validity of any marriage duly solemnized, *followed by cohabitation,* nor the validity of common-law marriages as heretofore recognized in the state." What is the legal scope of the word "cohabitation?" Does the word necessarily involve sexual intercourse, or is a mere living together as husband and wife sufficient to constitute cohabitation within the meaning of the statute? Further, is a mere living together following the ceremony or solemnization of the marriage, irrespective of the purpose of doing so, sufficient to meet the requirements of the statute as to cohabitation? The courts of Mississippi, in the case of *Hunt v. Hunt,*[1] have answered these questions in the affirmative.

The facts in that case were as follows: The complainant, a girl of the age of thirteen years and ten months and a member of the Roman Catholic Church, and the defendant, a boy of eighteen years, went into a county other than that of the female's residence and there bought a marriage license and were married by a justice of the peace. The local priest of the Catholic Church refused to sanction the marriage until the girl became fourteen. The parties did not live together; each went to his or her respective homes. Three weeks later, however, the complainant went to the home of the defendant and there lived with him for a period of three weeks. They slept together in the same room, and otherwise publicly acted as though they were man and wife. They testified, however, that, pursuant to an agreement with the complainant's mother, there was no sexual intercourse. At the end of the three weeks the complainant returned to her mother, and later brought suit for annulment of the marriage on the ground that it was void. *Held:* That the marriage was valid; annulment was refused; that the marrige license issued by the circuit court clerk was valid, though the female did not reside in that county; that "cohabitation," as used in the statute providing that failure to comply with provisions thereof shall not affect the validity of any marriage duly solemnized, followed by "cohabitation," means the public assumption by a man and a woman of the marital relation and dwelling together as such, thereby holding themselves out to the public as being man and wife, irrespective of whether there is coition; that the marriage was valid, notwithstanding a subsequent agreement between the parties as to its legal effect.

[1] 172 Miss. 732, 161 So. 119 (1935).

The word "cohabitation" is of large signification, and since it does have such an extensive legal scope the term must be interpreted according to the purpose for which it is employed. There is what may be termed lawful cohabitation and illicit cohabitation.[2] When the parties have been married as prescribed by law and thereafter cohabit as man and wife—carrying out the marital duties to each other—then there is lawful cohabitation. But if the parties cohabit in a manner other than that prescribed by law—in a manner which is repugnant to the good morals of the community and state—then the cohabitation is illicit and unlawful.

"Cohabitation," as it is commonly used in reference to the marital relation, is defined by the courts as the living or dwelling together of the parties as husband and wife.[3] The Mississippi courts have held that it is a condition or status of the parties; a status resembling that of the marital relation.[4] The term implies continuity; it is not merely a sojourn, nor a habit of visiting, nor even a remaining for a time.[5]

Several states have passed statutes providing penalties for unlawful cohabitation, whether in adultery or fornication. The

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[2]Sharon v. Sharon, 75 Cal. 1, 35, 16 Pac. 345 (1888).

[3]Hunt v. Hunt, 172 Miss. 732, 161 So. 119 (1935).

Cox v. State, 117 Ala. 103, 23 So. 806, 41 L. R. A. 760, 67 Am. St. Rep. 166 (1898) (citing Bouvier, Law Dictionary). "Cohabitation" means to live together in the same house claiming to be married, or when used with reference to the relation of parties as husband and wife, merely to live together in the same house.

Turney v. State, 60 Ark. 259, 29 S. W. 893 (1895). BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 1669: "To 'cohabit' is to dwell together, so that matrimonial cohabitation is the living together of a man and woman ostensibly as husband and wife."

State v. Chandler, 132 Mo. 155, 33 S. W. 797, 798, 53 Am. St. Rep. 483 (1896). The word "cohabit" is said to mean to dwell or live together as husband and wife.

In re Mills' Estate, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175 (1902). The word "cohabiting" as used in Code Civ. Proc. § 1962, providing that the issue of a wife cohabiting with her husband is presumed to be legitimate, means living together of man and woman ostensibly as husband and wife.

Stein v. Stein, 5 Colo. 55, 56 (1879). Matrimonial cohabitation must certainly comprehend a living together as husband and wife, embracing relative duties as such, and does not mean merely living together in the same house.

[4]Granberry v. State, 61 Miss. 440, 444 (1884); Kinard v. State, 57 Miss. 132, 134 (1879); Carotti v. State, 42 Miss. 334, 345, 97 Am. Dec. 465 (1868).

[5]In re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. 556 (1887).

State v. Way, 5 Neb. 283, 290 (1877). To "cohabit" according to the sense in which the word is used in a penal statute, means dwelling together as husband and wife, or in sexual intercourse, and comprises a continued period of time. Hence the offense is not the single act of adultery; it is cohabiting in a state of adultery; and it may be a week, a month, a year, or longer, but still it is one offense only.

Luster v. State, 23 Fla. 339, 2 So. 690 (1887). "Cohabit," as used in a statute relating to the offense of unmarried persons cohabiting together, means "a dwelling or living together, not a transient or single unlawful interview."

Robinson v. Robinson, 188 Ill. 371, 58 N. E. 906, 908 (1900). The "cohabitation" of a man and woman as husband and wife means dwelling together, and not a habit of visiting each other, however frequent.

Mississippi courts have held that under such statute it is the habitual lying together which constitutes cohabitation; and mere proof of one or more occasional separated acts of sexual intercourse is not sufficient.[6] The United States Supreme Court has held under such a statute that the offense must be inherently continuous.[7]

As above stated, the weight of authority, in defining cohabitation in reference to the marital relation, holds that it means the living or dwelling together of the parties *as husband and wife*. What do the courts mean when they say cohabit as husband and wife? The Arkansas courts have held that in order to constitute cohabiting together as husband and wife within the prohibition of a statute declaring it shall be a crime for two persons not married to cohabit together as husband and wife, it is not necessary that they should continuously sustain the relation of husband and wife toward each other. Nor is intercourse between them necessary. But the mere fact that they live in the same house and have intercourse does not satisfy the statute.[8] Cohabiting together as husband and wife means living together publicly in the face of society as if the conjugal relation existed.[9] It is a manifestation of the parties having consented to contract that relation *inter se*. It is a holding forth to the world, by the manner of daily life, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife: and, when credit is given to these representations and this continued conduct by those among whom they live, habit and repute arise and attend upon the cohabitation, and the parties are holden and reputed to be husband and wife.[10] Marital cohabitation is usually evinced by the parties being received in the social activities and society of their friends as husband wife and being entertained by them as such; being visited by families in their community and neighborhood; and by their attending church together, making appearances at public functions together, addressing each other as persons actually married, and openly bearing the same name.

Marital cohabitation has the same meaning in a prosecution for bigamy, when a bigamous marriage takes place in one state and the prosecution is based upon the cohabitation with the second wife in the state of the forum.[11]

Where the term "cohabitation" is used in a statute that prohibits the parties from "lewdly and lasciviously cohabitating," habitual

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[6]Spikes v. State, 98 Miss. 483, 54 So. 1 (1910).
[7]In re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. 556 (1887).
[8]Taylor v. State, 36 Ark. 84 (1880).
[9]Bush v. State, 37 Ark. 215, 218 (1881).
[10]Bishop v. Britain Inv. Co., 229 Mo. 699, 738, 129 S. W. 668 (1910).
[11]State v. Gieseke, 125 Minn. 497, 147 N. W. 663 (1914).

intercourse is the gist of the offense.[12] In the case of *Granberry v. State,*[13] the Mississippi court said:

"It is probably sufficiently accurate to say that it condemns the state of concubinage in which the parties, whether dwelling together or not, habitually indulge in sexual intercourse. It is not necessary that they shall dwell together, nor that they publicly avow the relationship which exists between them. It is sufficient to show that condition or relation, whether it be avowed or concealed, which, if publicly known, would lead men to characterize the woman as the mistress of the man. It is habitual concubinage or lying together which constitutes the cohabitation meant by the statute. Where a cohabitation, using the word in its usual sense, is shown, one or more acts of sexual intercourse clearly proved, or circumstances from which the fact of such intercourse would necessarily be inferred, as that the parties slept in the same bed, would uphold a verdict of guilty; but in the absence of evidence of such cohabitation or living together it is not sufficient to prove occasional acts of sexual intercourse. It is necessary to prove such intercourse so often repeated as to become habitual, or circumstances indicating that it is habitual."

Under the penal statute which prohibits such cohabitation it is, therefore, essential to the maintenance of the action that habitual intercourse be proved, or circumstances from which the fact of such intercourse would be necessarily inferred. Thus the term used in this sense involves sexual intercourse which is the gravemen of the offense which such penal statutes seek to prevent. Here the term takes an additional aspect, viz., sexual intercourse, which is not involved in the term cohabitation when the parties are legally married and then cohabit as husband and wife. Though sometimes the courts have held that when the term is used in a specific sense it implies sexual intercourse, the general rule is to the contrary.[14] However, where the parties cohabit as husband and wife the courts have held that sexual intercourse will be presumed or implied.[15] The Alabama courts held in the case of *Cox v. State,*[16] under the last clause of the Criminal Code of 1896, § 4406, which provides: "if any person having a former husband or wife living marries another,

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[12]Jones v. State, 133 Miss. 801, 98 So. 342 (1923); Spikes v. State, 98 Miss. 483, 54 So. 1 (1910); Newman v. State, 69 Miss. 393, 10 So. 580 (1892); Carotti v. State, 42 Miss. 334, 345, 97 Am. Dec. 465 (1868); Granberry v. State, 61 Miss. 440, 444 (1884); Brown v. State, 108 Ala. 18, 21, 18 So. 811 (1895); Collins v. State, 14 Ala. 698 (1848); Commonwealth v. Calef, 10 Mass. 153 (1813); Delaney v. Pio, 10 Mich. 241 (1862); State v. Williams, 94 Minn. 319, 102 N. W. 722 (1905).

[13]Granberry v. State, 61 Miss. 440, 444 (1884).

[14]Hunt v. Hunt, 172 Miss. 732, 161 So. 119 (1935); Cannon v. United States, 116 U. S. 55, 76, 6 Sup. Ct. 278, 29 L. ed. 561 (1885); Commonwealth v. Lucas, 158 Mass. 81, 84, 32 N. E. 1033 (1893); In re Watson, 19 R. I. 342, 347, 33 Atl. 873 (1896).

[15]Cox v. State, 117 Ala. 103, 23 So. 806, 41 L. R. A. 760, 67 Am. St. Rep. 166 (1898); Burns v. Burns, 60 Ind. 259, 260 (1877).

[16]117 Ala. 103, 23 So. 806, 41 L. R. A. 760, 67 Am. St. Rep. 166 (1898).

or continues to cohabit with such second husband or wife in this state, he or she must, on conviction be imprisoned, etc.," it is unnecessary, to constitute the crime of bigamy, that sexual intercourse should continue during the whole time the parties live together, but the crime is committed when they live under the same roof and acknowledge each other as husband and wife, although they are prevented, by incapacity, from committing the carnal act. The Indiana court held in the case of *Burns v. Burns*[17] that cohabitation implied sexual intercourse, and will be inferred when the parties live together as husband and wife.

There are two views as to whether cohabitation is necessary in addition to present consent in the case of common-law marriages. One is that cohabitation is not essential to complete the marriage and that mutual consent only is necessary; and the other view is that cohabitation is essential.

In regard to the view that cohabitation is not essential, the courts have held that if mutual agreement in fact is clearly established by direct evidence, neither holding out nor cohabitation is necessary to constitute the parties husband and wife.[18] Cohabitation, if it follows, adds nothing in law, although it may be evidence of the marriage. That which makes the marriage is the mutual present consent, lawfully expressed.[19] This view is said to be the proper one, because by "cohabitation" is meant not only sexual intercourse, but openly living together as husband and wife. Since this entails a lapse of time sufficient to enable the public to judge the relations of the parties, to hold otherwise would in most instances of marriage by private consent, result in sexual intercourse before the completion of the marriage by "cohabitation as husband and wife," a result exactly contrary to the real purpose of the marriage laws. The court in *Hulett v. Carey,*[20] commenting upon the case of *State v. Worthingham,*[21] states that while it is true that a present agreement, deliberately made and acted upon by living together, is sufficient to constitute the marital relation, the court should not be regarded as even intimating living together is necessary, if the contract is shown to have been actually made. The rule is that to render competent parties husband and wife, there need only be an agreement in the present tense to become such, no lapse of time being contemplated before the assumption of the status.

In reference to the view that cohabitation is essential, it has been said that mutual agreement, between competent parties, to take each

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[17]60 Ind. 259, 260 (1877).

[18]Klipfel v. Klipfel, 41 Colo. 40, 92 Pac. 26, 124 Am. St. Rep. 96 (1907); Hiler v. People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221 (1895); People v. Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. Rep. 408 (1899); Hulet v. Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384 (1896); Jackson v. Winne, 7 Wend. 47, 22 Am. Dec. 563 (N. Y. 1831); State v. Patterson, 24 N. C. 346, 38 Am. Dec. 699 (1842).

[19]Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384 (1896).

[20]66 Minn. 327, 67 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384 (1896).

[21]23 Minn. 528 (1877).

other presently as husband and wife, acted upon by living in that manner, is sufficient to constitute a valid marriage,[22] but in some instances, where such expressions were used, the court was merely stating a proven or admitted fact in that particular case, while in others the contract of marriage was sought to be proved by habit and repute, and the courts merely meant that the act of the parties in holding themselves out as husband and wife is evidence of a marriage. Where the express consent is not shown by indubitable evidence, or where the words which the parties exchange do not manifest an intelligent exchange of consent, evidence of cohabitation or other circumstances is frequently resorted to, not necessarily upon the theory that consent alone is not sufficient to constitute marriage, but for the obvious purpose of establishing consent.[23] It seems plain that if the parties, with matrimonial intent, solemnly and unmistakably agree then and there to become husband and wife, they *ipso facto* become such, and it is only where there is some doubt as to whether consent has been intentionally and intelligently exchanged that resort need be had to the circumstances to establish a marriage. The agreement is an affirmative and creative act; the circumstances but evidence of consent. Circumstances can establish a marriage only so far as they tend to show consent. It is a mistake of principle to require, in addition to consent, evidence of cohabitation, the sole function of which is to show consent. While the fact that sexual intercourse has occurred is cogent evidence to show consent, yet if the consent may be otherwise proved, the existence of intercourse is unimportant.

Thus, we see the courts holding that consent is the only ingredient necessary to constitute a valid common-law marriage; and cohabitation followed by sexual intercourse is not essential to the consumation of the common-law marriage; the only value of cohabitation or sexual intercourse is as evidence to show or prove consent. Therefore, cohabitation or "habit" is circumstantial evidence for or against the existence of the marriage. From it persons who know the parties form an opinion as to the existence of the marriage relation. This opinion of individuals, when crystallized into a collective opinion of the community, is the "repute" which is nearly always found to be an evidentary companion of "habit."

Is the analogy of cohabitation, as it affects common-law marriages, applicable to cases where there is a statute such as there is in the case under consideration? The purpose of cohabitation under the statute could not be to show consent, because consent is clearly demonstrated and shown in the attempt to solemnize a statutory marriage. Nor can the cohabitation be for the purpose of ratification of a void marriage, when the word ratification is used in its

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[22]Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164 (1875); People v. Mendenhall, 119 Mich. 404, 74 N. W. 325, 75 Am. St. Rep. 408 (1899); Simon v. State, 31 Tex. Crim. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802 (1892).

[23]L. R. A. 1915 E. 29.

strict sense. The probably purpose of the Legislature in stipulating that cohabitation would make the marriage valid even though the requirements of the statute had not been complied with, is to prevent social disgrace where the parties have attempted to comply with the statute and failed, and have followed this by a course of conduct which would be scandalous were it not in fulfillment of a valid marriage. It was also the purpose of the Legislature to protect the children of parties who had attempted to comply with the marriage law, but who had failed.

Since open cohabitation between unmarried parties is equally scandalous in the eyes of the public whether or not there has been intercourse, the court is correct in saying that sexual intercourse is not necessary to constitute cohabitation for the purpose of the statute. Though the courts were inclined to hold that intercourse was necessary to complete cohabitation, yet the problem of proof of coition would be so difficult that the purpose of the statute would be completely frustrated. Hence the statement that sexual intercourse is not necessary may well be another way of saying that where there has been cohabitation as husband and wife sexual intercourse will be conclusively presumed by the courts.

In the case under discussion there was also involved the question whether the clerk of the circuit court of Clarke county was authorized by statute to issue the marriage license. Section 3245 of the Code of 1906, which now appears as Section 2362 of the Code of 1930, provides that: "Marriage licenses shall be granted and issued by the *clerk of the circuit court of the county in which the female usually resides,* under the following regulations and restrictions, etc." Section 2363 of the Code of 1930 provides that: "It shall be unlawful for the circuit clerk to issue a marriage license until the following conditions precedent shall have been complied with: a. Parties desiring marriage license shall make application therefor in writing to the *clerk of the circuit court of any county* in the state of Mississippi and forthwith file the same with the clerk, etc." The counsel for the appellant contends that all sections of the Code dealing with the same subject matter should be read together and apparent conflicts thereunder harmonized, and that Section 2363 of the Code of 1930, when read in connection with Section 2362 of the Code of 1930, should be construed as though it read: "Parties desiring a marriage license shall make application therefor in writing to the clerk of the circuit court of any county in the State of Mississippi in which the female usually resides."

The court held that this argument might be hard to answer if Section 2363 was in fact a part of the Code of 1930, but that the said section is not a part of the Code adopted by the Legislature. That section is Chapter 237 of the Laws of 1930—the Code of 1930 having been adopted in that year—and was placed in the printed form by the Attorney-General pursuant to a requirement of the statute by which the Code was adopted.

A concurrent resolution[24] adopted by the Legislature at its 1930 session, appearing at page 161 of the Code of 1930, provides: "The enrolled bills of said laws of 1930, passed at the regular session aforesaid, shall, as filed with the Secretary of State, control in all cases over the same as published in said Code, any change or omission as hereby authorized to the contrary notwithstanding." By this resolution it is clear that the Legislature intended that any statutes passed at the 1930 session were to prevail over any provision of the Code adopted at that session, if that provision be in conflict with any of the statutes passed at the 1930 session.

Chapter 237 of the Laws of 1930 was adopted in May of that session and became effective on June 1, 1930, the title of it being: "An Act to revise the laws of the State of Mississippi relating to marriage; to provide the terms, conditions and manner in which licenses to marry will be issued and marriage solemnized; and to provide punishment and penalties for violation of this Act." Section one conforms with and is the same as section 2363 of the Code of 1930. Section six of the Act provides: "That all laws or parts of laws in conflict with the provisions of this Act be and the same are hereby repealed, but all laws or parts of laws not in direct conflict with the provisions of this Act shall be and remain in full force and effect."

The marriage statute in force when chapter 237 of the Laws of 1930 was enacted, was chapter 95 of the Code of 1906, section 3245 of which is now section 2362 of the Code of 1930. This section, or so much as conflicts with chapter 237 of the Laws of 1930, is repealed. The grant of power in chapter 237 to the circuit clerk of *any* county to issue a marriage license when applied to therefor clearly conflicts with the restriction of this power in section 3245 of the Code of 1906, to a particular clerk, and therefore this portion of section 3245 of the Code of 1906 now section 3263 of the Code of 1930, is repealed.

Necessarily, since these two statutes are partly in conflict, there has been much confusion with reference to the issuance of marriage licenses. The court in deciding the case under discussion has done much in clearing the confusion which heretofore existed.

E. P. WINDHAM.

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[24]Miss. Laws 1930, c. 285.

RECENT IMPORTANT DECISIONS

CHATTEL MORTGAGES—DESCRIPTIONS OF PROPERTY—SUFFICIENCY

A mortgagee held a mortgage conveying to him a fish and poultry display case and describing the property conveyed as "1-5' Fish and Poultry Display Case complete, No. 5018." Attached to the case was a metal strip with the figures "5018" stamped upon it. The mortgagee brought this action in replevin to recover the case from a purchaser from the trustee in bankruptcy of the mortgagor. *Held:* That the description of the property sought to be conveyed by the mortgage was so indefinite as to render the mortgage void for uncertainty, since it did not appear that the serial number was intended to designate the particular display case, parol evidence being inadmissible to show that the number was intended to have such effect. *National Foods Inc. v. Friedrich,* .... Miss. ...., 163 So. 126 (1935).

As to the degree of certainty and exactness of description requisite in a chattel mortgage, the authorities seem to be somewhat at variance, though all concur in holding that such a mortgage, as well as a mortgage of real estate, may be void for uncertainty.[1] The Mississippi Supreme Court seems to lean toward a rather strict interpretation of the rules regarding the sufficiency of descriptions in chattel mortgages,[2] and the admission of parol evidence in aid of descriptions.[3] It holds that the fact of the ownership or locality of the property, or some other mark, which, when proved to exist, would separate and distinguish it from other property, should be mentioned in the mortgage. If the description in that instrument be so vague and uncertain as necessarily to apply equally to all property of that kind, then it is clear that there can be no identification of it, without proving some fact or circumstance connected with the property, not referred to in the mortgage.[4] To be held good as to third parties, the instrument must give essentials and facts which will render the description sufficiently definite to insure identification, or to aid in dis-

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[1]Golden v. Cockrill, 1 Kan. 259, 81 Am. Dec. 510 (1862).

[2]Kelly v. Reid, 57 Miss. 89 (1879); Nicholson v. Karpe, 58 Miss. 34 (1880); Williams & Williams et al. v. Crooke & Gaddis, 63 Miss. 9 (1885); Houston v. Totten & Bro., 1 Miss. Dec. 244 (1886); Leffel v. Miller, 7 So. 324 (Miss. 1890); Fidelity & Deposit Co. of Maryland v. B. F. Sturtevant Co., 86 Miss. 509, 38 So. 703, 109 Am. St. Rep. 716 (1905).

[3]Kelly v. Reid, 57 Miss. 89 (1879), cited note 3, *supra;* In re Caver, Caver & Co., 42 F. (2d) 293 (S. D. Miss. 1930). But see Wasson v. Comer, 54 Miss. 351 (1877).

[4]Liquid Carbonic Corp. v. Phillips, 68 F. (2d) 515 (C. C. A. 5th 1930). The court cites and quotes from Kelly v. Reid, 57 Miss. 89 (1879): "The mortgage must mention some fact or circumstance connected with the property which will serve to distinguish it from all other property of the same kind. This fact or circumstance must be stated in the mortgage itself; it cannot be proved by parol evidence without thereby adding to the mortgage a term not contained in it. When thus stated, its existence in connection with the property may be established by extrinsic evidence. . . . If the description in that instrument be so vague and uncertain as necessarily to apply equally to all property of that kind, then it is clear that there can be no identification of it, without proving some fact or circumstance connected with the property not referred to in the mortgage."

tinguishing the property from all other property of the same kind.[5] In *Kelly v. Reid*,[6] the leading Mississippi case on this point, George, C. J., states that he was at first of the impression that an otherwise insufficient description might be aided by the presumption that the mortgagor was the owner of the mortgaged property, but that the earnestness with which his colleagues argued on the other side convinced him that he was mistaken.[7]

It appears that Louisiana decisions are in accord with those of Mississippi in holding that identification of property must be possible from the face of the instrument of mortgage in order to affect third persons acquiring rights against the mortgaged chattels.[8] The description must be sufficient to separate the mortgaged property from all other chattels of the same kind or type.[9]

More lenient rules for determining the sufficiency of the description appear in other jurisdictions. It is obviously impossible in most cases to set forth on the face of the mortgage all the articles embraced in it with such precision that anyone, by a mere inspection of the mortgage, without reference to any other source of information, can identify them. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect—the parties and their privies. Descriptions do not identify of themselves; they only furnish the means of identification.[10]

Generality and indefiniteness in the description of the property are not sufficient to avoid a mortgage, but there must be uncertainty remaining after the mortgage has been interpreted in the light of the attendant circumstances, the clear intent of the parties being regarded.[11] The description may be general, yet if it is sufficient to put a third party on inquiry which would disclose the property, the mortgage is not invalid for uncertainty,[12] although indefinite and requiring supporting proof.[13]

The weight of authority is to the effect that the description is sufficient if it will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property. The general test in determining the sufficiency of description is whether it suggests or indicates inquiries or means of identification, which if pursued, will disclose the property conveyed.[14] It

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[5]Fidelity & Deposit Co. of Maryland v. B. F. Sturtivant Co., 86 Miss. 509, 38 So. 783, 109 Am. St. Rep. 716 (1905), cited note 3, *supra*.

[6]57 Miss. 89 (1879).

[7]*Contra:* H. O. Wooten Groc. Co. v. Wade Meat Co., 37 S. W. (2d) 1090 (Tex. Civ. App. 1931).

[8]Roberts v. Atkins et ux. (Bullard et al., Interveners), 141 So. 427 (La. App. 1932).

[9]Consolidated Co., Inc. v. Laws (McCrary Refrigerator Sales Co., Interveners) 11 La. App. 676, 124 So. 775 (1929). The property was described as "No. 75 Refrigerator, to be shipped from factory."

[10]JONES, CHATTEL MORTGAGES (6th ed. 1933) §§ 53 and 54.

[11]Truss et al. v. Harver, 120 Ala. 636, 24 So. 927 (1898); Woods v. Rose et al., 135 Ala. 297, 33 So. 41 (1902); Abernathy v. Worthy et al., 221 Ala. 529, 129 So. 472 (1930).

[12]Smith v. Fields, 79 Ala. 335 (1885); American Bank & Trust Co. v. Feeney Tool Co., 106 Conn. 159, 137 Atl. 756 (1927).

[13]Kelly v. Cassells, 147 So. 597 (Ala. 1933).

[14]In re Brannock, Wickham v. Barlow, 131 Fed. 819 (N. D. Iowa 1904): "A description which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property, is sufficient";

is uncertainty that will not be removed when the conveyance is read in the light of the circumstances surrounding the parties at the time it was entered into, and their manifest design is considered, that will render a conveyance void.[15] Whether the stated inquiry would have led to the discovery of the property covered by the mortgage is a question for the jury.[16]

The authorities are numerous in holding that parol evidence is admissible to identify property described in a mortgage.[17] It is permitted, not to furnish the dscription, but to aid, if possible, the description given in the mortgage, in the identification of the mortgaged property.[18] The description is sufficient if it can be made certain by the aid of extrinsic evidence.[19] The rule is founded on the maxim: "That is certain which can be rendered certain."[20] However, such evidence may aid, but not make, a description; the mortgage must of itself suggest an inquiry which will result in identification.[21]

Turning now to the instant case, we find the court using this language: "It may be, as the oral evidence indicates, that the case was manufactured by Ed Friedrich; that his name as the manufacturer was stamped thereon, and that the number '5018' is his serial number intended to designate this particular display case. Nevertheless that fact is not disclosed by the mortgage and cannot be added thereto by parol." The court then quotes from *Houston v. W. W. Totten & Bro.*,[22] in which the description was: "One twelve-horsepower engine and boiler, and one No. 10 inspirator and piping and belting." The deed of trust in that case was held void, but no further comment was made by the court. However, that case seems to be distinguishable from the instant case, in that, although the number preceding the inspirator was not mentioned by the court, it was brought out in the appellee's brief that the number referred to the size of the inspirator and was not a serial number. The number placed on the display case obviously did not refer to its size. What, then, was its purpose? It appears to the writer that a number being stamped on a metal

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Overstreet Grain Co. v. Ford, 113 Ark. 464, 168 S. W. 1080 (1914); Golden v. Cockrill, 1 Kan. 259, 81 Am. Dec. 510 (1862); Parsons v. Sargent, 20 Kan. 580, 81 Am. Dec. 519 (1878) Tootle, Hanna & Co. v. Lepter, 26 Kan. 597 (1881); H. O. Wooten Groc. Co. v. Wade Meat Co., 37 S. W. (2d) 1090 (Tex. Civ. App. 1931); McKeever v. Brooks-Davis Chevrolet Co. et al., 74 S. W. (2d) 311 (Tex. Civ. App. 1934).

[15]Johnson et al. v. Grissard, 51 Ark. 410, 11 S. W. 585 (1889).

[16]Thompkins v. Henderson, 83 Ala. 391, 3 So. 774 (1888); Stickney v. Dunaway & Lambert, 169 Ala. 464, 53 So. 770 (1910).

[17]In re Beard, 204 Fed. 129 (S. D. Ga. 1913); First Nat. Bank of Fitzgerald v. Spicer, 10 Ga. App. 503, 73 S. E. 753 (1912); Jones, etc. Auto Co. v. Lott, 17 Ga. App. 834, 88 S. E. 719 (1916); Baldwyn v. Royce, 152 Ind. 46, 51 N. E. 334 (1898); Clapp v. Trowbridge, 74 Iowa 420, 38 N. W. 411 (1888); Bruce v. Karp, 222 Mo. App. 77, 1 S. W. (2d) 214 (1928); Harris v. Allen, 104 N. C. 86, 10 S. E. 127 (1889); H. O. Wooten Groc. Co. v. Wade Meat Co., 37 S. W. (2d) 1090 (Tex. Civ. App. 1931).

[18]Baldwyn v. Royce, 152 Ind. 46; 51 N. W. 334 (1898), cited note 17, *supra.*

[19]First Nat. Bank of Fitzgerald v. Spicer, 10 Ga. App. 503, 73 S. E. 753 (1912), cited note 17, *supra.*

[20]Baldwyn v. Royce, 152 Ind. 46; 51 N. W. 334 (1898).

[21]Everett v. Brown, 64 Iowa 420, 20 N. W. 743 (1884); Roberts v. Atkins, 141 So. 427 (La. App. 1932) Talmage-Sayer Co. v. Smith, 7 P. (2d) 536 (Mont. 1934).

[22]1 Miss. Dec. 244 (1886).

strip attached to the display case was a fact which would put a third party on inquiry, which, if pursued, would sufficiently identify the property as that described in the deed of trust. The court stated that the fact that the number was intended to designate this particular display case was not disclosed by the mortgage, which could not, therefore, be added to by parol. If the number was intended to designate this particular case, the use of it in indicating the property was "some fact or circumstance connected with the property which would serve to distinguish it from all other property of the same kind," using the language quoted by the court from *Kelly v. Reid.*[23] It was a fact or circumstance "stated in the mortgage itself"; and "when thus stated, its existence in connection with the property may be established by extrinsic evidence." When property is distinguished from other property of like kind by a number stamped on it, the statement of that number in describing the property is one of the most certain identifications known. An illustration of that fact most generally known and used is the identification of automobiles by their motor numbers. After exhausting the authorities on that point, no case has been found where a description of an automobile by motor number has been held so uncertain as to invalidate the mortgage, except in cases where the number was incorrectly stated. Using the language adopted by the court, it has been shown that there was a fact or circumstance stated in the mortgage itself which would have differentiated the particular display case from all others of the same kind, and having been stated in the instrument, its effect or "existence in connection with the property" might have been established, as was attempted in this case by extrinsic evidence.

R. G. GRANTHAM.

ALIMONY—EXEMPTIONS UNDER THE WORLD WAR VETERANS' ACT

A wife sued her husband for divorce and obtained a decree for temporary alimony and attorney's fees. Under the decree rendered, the husband sought to avoid payment out of pension money coming to him from the government, by invoking the exemption provision of the World War Veterans' Act.[1] *Held:* The wife, under the decree for alimony, was not a "creditor"[2] within the meaning of the act exempting compensation, insurance, and maintenance payable thereunder from claims of creditors, since ordinary contractural obligation or statutory debt was contemplated by the act. *Stirgis v. Stirgis,* ....Miss. ...., 160 So. 285 (1935).

The main issue here involved, and also presented in the case of *Hollis v. Bryan,*[3] which formed a direct precedent for this decision, is whether alimony constitutes a debt as contemplated by the exemption statute. Mississippi holds

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[23]57 Miss. 89 (1879).

[1]See World War Veterans' Act, § 22, 38 U. S. C. A. § 454; "Compensation not subject to claims of creditors of any person to whom award is made under act."

[2]General definition: "He who has the right to require the fulfillment of an obligation or contract." 1 Bouvier Law Dictionary (Rawles' 3rd Revision 1914) 727; see also WORDS AND PHRASES.

[3]Hollis v. Bryan, 166 Miss. 874; 143 So. 687 (1932).

negatively on the question. Elsewhere there is a diversity of holdings regarding the effect of exemption statutes on alimony decrees. The courts seem to term alimony a debt when certain conditions are present, and not a debt under other circumstances.

In analyzing the cause for this diversity, two main queries are presented:

1. What is the fundamental principle behind the statute—viz: what is the intention and purpose of exemptions?

2. With this purpose in mind, can the diversity of holdings in regard to whether a decree for alimony constitutes a debt be reconciled?

First, pension money has as one of its main purposes the support of the pensioner's wife and family.[4] Exemption laws are passed to protect these sums. Such exemption laws carry out the general motivating force behind pension grants, in that they are not intended solely for the protection of the debtor, but principally for the protection of his wife and family.[5] This calls for a liberal interpretation of exemption statutes.[6]

Alimony has been held to be an award by the court, based upon the consideration of equity and public policy. It is founded upon that obligation of the husband to support his wife, which obligation arises out of the marriage relation and continues after legal separation when that separation is not due to the fault of the wife.[7] "The allowance only becomes a debt in the sense that the general duty over which the husband has discretionary control has changed into a specific duty over which he has no control."[8] This is representative of the majority view.

Alimony is in the nature of a penalty;[9] and imprisonment for failure to pay such alimony when awarded has been held in the majority of decisions not to be a violation of the constitutional provision[10] prohibiting imprisonment for debt.[11]

A contrary conclusion was reached, however, in a leading Missouri case, *Ex parte Kinsolving*,[12] where imprisonment was not allowed for failure to

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[4]Tully v. Tully, 159 Mass. 91, 34 N. E. 79 (1893).

[5]"Exemption laws . . . primarily for protection of family." Schooly v. Schooly et al., 184 Iowa 835, 169 N. W. 56 (1918); Tully v. Tully, 159 Mass. 91, 34 N. E. 79 (1893).

[6]De Baum v. Hulett Undertaking Co., 169 Miss. 488, 153 So. 513 (1934) (liberal construction in favor of veteran and of his estate, or beneficiary named in certificate).

[7]Fichel et al. v. Granger, 83 Ohio St. 101, 93 N. E. 527, 32 L. R. A. (N. S.) 270 (1910); Fanchier v. Gammil, 155 Miss. 316, 124 So. 365 (1929); Caldwell v. Central of Georgia Ry. Co., 158 Ga. 192, 123 S. E. 708 (1924) ("Decree for alimony stands upon different basis from ordinary debt").

[8]Turner v. Turner, 108 Fed. 785 (D. Ind. 1901).

[9]Turner v. Turner, 108 Fed. 785 (D. Ind. 1901); Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351 (1900).

[10]Miss. Const. 1890, § 30.

[11]In re Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736 (1901); I Enc. Pleading and Practice 439 (citing many cases); Andrew v. Andrew, 62 Vt. 495, 20 Atl. 817 (1890); State v. King, 49 La. A. 1503, 22 So. 887 (1897); Adams v. Adams, 80 N. J. Eq. 175, 83 Atl. 190 (1912).

[12]135 Mo. App. 631, 116 S. W. 1068 (1909) (Follows precedent set in Coughlin v. Elhert, 39 Mo. 285 (1866)); Leeder v. State, 55 Neb. 133, 75 N. W. 541 (1898) (Decision reached by following Section 20 of the Bill of Rights of Nebraska: "No person shall be imprisoned for debt in any civil action or mesne or final process unless in case of fraud").

pay alimony. The court interpreted a judgment or decree for alimony as simply a judgment or decree for the payment of a debt. A possible reconciliation might be reached between the Missouri cases and the weight of authority by looking into the view which Missouri takes in regard to divorces. Divorces in that state are treated as purely civil actions, and therefore decrees for alimony fall within the statute of Missouri setting forth: "No person shall be arrested, held to bail, or imprisoned on any mesne process or execution, founded on any civil action whatsoever."[13]

Mississippi follows the majority ruling.[14] Apart from the question of imprisonment for failure to pay, in which most of the courts are in accord, there are other cases which hold a decree for alimony to be a debt.[15] An investigation into these cases reveals that the reason for the holdings therein rendered is that it was for the benefit of the wife and family that the decree be designated a debt, in order that it might be enforced against, or protected from, claims of third parties.

In brief, the courts today, in a decree for alimony, look first to the interest of the wife and family, and govern their holdings and phrase their decisions to protect these interests. This fact is largely responsible for the diversity of holdings as to the nature of alimony.

Since pensions are granted for the support of the family in its entirety, and since the welfare of the wife under her divorce decree is paramount,[16] the courts will not allow a wayward husband to place a premium on his own misconduct by invoking the aid of the exemption statute.

G. L. ADAMS.

CONTRACTS—SPECIFIC PERFORMANCE—RIGHT OF LABOR UNION TO ENFORCE CONTRACT WITH EMPLOYER

Local theatrical employees union executed a one year contract with Theatres Corporation, whereby latter contracted to employ only union men, and the union consented to furnish competent workers. Employer could terminate contract with any individual upon two weeks notice, and individual employee had the same right. Complainant labor union seeks injunction requiring defendant to carry out its contract by employing only members of complainant union. Case is on appeal from overruling of motion to dissolve temporary mandatory injunction. *Held:* Affirmed. Bill is not demurable, since contract is not one for "personal services," which pertain to an individual, but for the services

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[13]Ex parte Kinsolving, 135 Mo. App. 631, 116 S. W. 1068 (1909) (Supreme court citing statutes: Mo. Rev. St. 1899) § 4685, Mo. Ann. St. 1906, § 2552.

[14]Fanchier v. Gammill, 155 Miss. 316, 124 So. 365 (1929). The only contra holdings in regard to imprisonment are found in Missouri and Nebraska.

[15]Schooly v. Schooly et al., 184 Iowa 835, 169 N. W. 56 (1918). (Judgment for alimony is debt and hence exempt as debt from certain garnishment proceedings); Szymanski v. Szymanski, 188 Iowa 931, 176 N. W. 806 (1920). (Alimony reduced to judgment constitutes debt within code section exempting wages of head of family from liability for debt); Purdon v. Blinn, 192 Mass. 387, 78 N. E. 462 (1906) (Claim of divorced wife under decree for alimony in gross is estate of former husband).

[16]Anderson v. Norvell-Shapleigh Hardware Co. et al., 134 Mo. App. 188, 113 S. W. 733 (1908) (Express statutory provision prohibiting allowance against judgments for alimony or maintenance.)

of a mass of employees. Complainant contracted to supply a particular class of labor to defendant, and if one individual is unsuitable, then union is prepared to furnish another. To recognize collective bargaining is necessarily to recognize a remedy for breach of a contract made thereby, where damages are inadequate. *Mississippi Theatres Corporation et al. v. Hattiesburg Local Union No.* 615, ... Miss. ...., 164 So. 887 (1936).

The great majority of courts now recognize that a labor union when authorized by its members may make contracts in their behalf,[1] and the objection that a contract violates the constitution and by-laws of a union cannot be raised by one outside the union.[2] And it has been held that, in entering into contracts with each other, both the union and the employers must consider the reasonable needs of the public.[3]

The questions regarding the validity of contracts providing for union labor only,[4] and the rights of all parties thereunder, are of comparatively recent origin. Earlier cases encountered as an obstacle the rule of non-enforceable personal service contracts; hence the courts refused to restrain breaches of contract in cases analogous to the instant one, on the ground that the services to be supplied were neither unique nor extraordinary.[5] Discussing the above rule in the instant case, the court cites *Chalmers et al v. Davis*,[6] which held that a court of equity would not decree specific performance of a contract by employees with a railroad company to assign them to its trains in accordance with seniority, since the contract was for personal service, and differentiates the Chalmers case from the principal case by pointing out that the former was instituted *by an individual* seeking specific performance of a personal service contract.

The same result, however, as if a labor union had been granted specific performance of a contract with an employer has been obtained to a certain degree by the kindred remedy of preventive injunctions,[7] and it is also well settled that where a labor union threatens a strike or other action in violation

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[1]Leading cases: Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280 (1905); Tracey v. Osborne, 226 Mass. 25, 114 N. E. 959 (1917); see, also, MAGRUDER, LABOR CO-PARTNERSHIP IN INDUSTRY (1922), 35 HARV. L. REV. 910; COLLECTIVE LABOR AGREEMENTS. Note (1931) 31 COL. L. REV. 1156 (1931).

[2]Hudson v. Cincinnati, N. O. & T. P. Ry. Co., 152 Ky. 711, 154 S. W. 47, 45 L. R. A. (N. S.) 184 (1913); see also, Des Moines City Ry. Co. v. Amalgamated Ass'n. of Street and Electric Ry. Employees of America, Div. 441, of Des Moines, 204 Iowa 1195, 213 N. W. 264 (1927).

[3]Chicago, B. & O. R. Co. v. Reed, 114 Kan. 190, 217 Pac. 322 (1923).

[4]See Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717 (1924); Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905).

[5]Schwartz v. Wayne, Circuit Judge (Schwartz v. Driscoll), 217 Mich. 384, 186 N. W. 522 (1922); Stone Cleaning and Painting Union v. Russell, 38 Misc. 513, 77 N. Y. S. 1049 (1912) (preceding cases cited in case under discussion).

[6]128 Miss. 613, 91 So. 346, 22 A. L. R. 114 (1922); see also, Sims v. Van Meter Lbr. Co., 96 Miss. 449, 51 So. 459 (1912).

[7]Gregg v. Starks, 188 Ky. 834, 224 S. W. 459 (1920) (enjoining breach of seniority); Leveranz v. Cleveland Home Brewing Co., 24 Ohio N. P. N. S. 193 (1922) (enjoining any conspiracy to breach contract); see also, Schlesinger v. Quinto, 201 App. Div. 487, 194 N. Y. S. 401 (1922) (affirming 117 Misc. 735, 192 N. Y. S. 564); Grassi Contracting Co. v. Bennett, 174 App. Div. 244, 160 N. Y. S. 279 (1916).

of its contract, a court of equity has jurisdiction to issue an injunction.[8] Thus it has been held that an employers' association which has contracted with a labor union may enjoin the officers and agents of the union from violating the contract by demanding modification thereof, and from inciting strikes.[9] Likewise, an employer has been restrained from continuing to employ members of a rival union in violation of his contract with the union.[10] Several cases prior to 1929 state *obiter* that specific performance has been granted in labor union contracts, thus failing to distinguish the above illustrated preventive injunction from an injunction to specifically perform.[11]

In 1929 the New York Court of Appeals decided *Ribner v. Roscoe Butter and Egg Co., Inc.*,[12] which is generally considered to be the leading case on the right of a labor union to enforce specific performance of its contracts. The court in the instant case relies on the Ribner case to sustain its holding, and notes at length therefrom, as, significantly: "The rights of a labor union to enforce the terms of a lawful contract . . . . *should not be determined by the character of the services to be performed by the union,* but should rest upon the mutual rights and obligations of the parties under the contract."[13]

Texas appears to have been the second state to have passed on the precise point under discussion. In 1932 its Court of Appeals affirmed the granting of specific performance of a contract to employ only members of the union in good standing.[14]

It would seem that Mississippi is one of the few states which have accepted the opportunity to go as far as New York and Texas in the use of injunctions in labor union contracts. Having in 1931 emphatically stated its recognizance of contracts effectuated through collective bargaining,[15] the court in the case at hand has reached the rational *sequitur* that, in labor union contracts, as in other impersonal contracts where the remedy at law is inadequate, a court of equity may provide a specific remedy co-extensive with the right.

WILLIAM ETHRIDGE, JR.

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[8]Folsom v. Lewis, 208 Mass. 336, 94 N. E. 316, 35 L. R. A. (N. S.) 787 (1911); Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457, 17 L. R. A. (N. S.) 162 (1908); see also, COOKE, COMBINATIONS, MONOPOLIES, AND LABOR UNIONS (2d ed.) 567, and cases cited.

[9]Barnes v. Berry, 156 Fed. 72 (1907); see also, Burgess v. Ga., F. and A. R. Co., 148 Ga. 415, 96 S. E. 864 (1918) (injunction restraining union from striking until contract expires); Preble v. Architectural Iron Workers' Union, 260 Ill. App. 453 (1931).

[10]Roosevelt Amusement Corporation v. Empire State Motion Pictures Operators' Union, 144 Misc. 644, 258 N. Y. S. 240 (1930); see, Suttin v. Christy Button Works, 144 Misc. 784, 258 N. Y. S. 863 (1930); Engleking v. Independent Wet Wash Co., 142 Misc. 510, 254 N. Y. S. 87 (1931); Goldman v. Cohen, 222 App. Div. 631, 227 N. Y. S. 311 (1928); Pearl v. Millman, 7 Law and Labor 286 (Mass. 1925); Henry v. Century Shoe Co., 12 Law and Labor 7 (Mass. 1929).

[11]See Schlesinger v. Quinto, 201 App. 487, 194 N. Y. S. 401, 409 (1922); Goldman v. Cohen, 222 App. Div. 631, 227 N. Y. S. 311, 313 (1928).

[12]135 Misc. 616, 238 N. Y. S. 132 (1929).

[13]Ribner v. Roscoe, 135 Misc. 616, 620, 238 N. Y. S. 132, 136 (1929).

[14]Harper et al. v. Local Union No. 520, 48 S. W. (2d) 1033 (Tex. Civ. App. 1932).

[15]Y. & M. V. R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931); see WITTE, LABOR'S RESORT TO INJUNCTIONS (1930), 39 YALE L. J. 374; FRANKFURTER AND GREENE (1928), THE USE OF THE INJUNCTION IN AMERICAN LABOR CONTROVERSIES, 44 LAW Q. REV. 164, 353 (1929); 45 LAW Q. REV. 19.